

Spring 1-1-2011

Treaty Content and Costs: Explaining State Commitment to the International Criminal Court

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Political Science Graduate Theses & Dissertations. Paper 13.

TREATY CONTENT AND COSTS: EXPLAINING STATE COMMITMENT TO THE
INTERNATIONAL CRIMINAL COURT

by

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A thesis submitted to the

Faculty of the Graduate School of the

University of Colorado at Boulder in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

Department of Political Science

2011

This thesis is entitled:
Treaty Content and Costs: Explaining State Commitment
to the International Criminal Court
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Date: May 5, 2011

The final copy of this thesis has been examined by the signatories, and we find that both the content and the form meet acceptable presentation standards of scholarly work in the above mentioned discipline.

ABSTRACT

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(Ph.D., Department of Political Science)

Treaty Content and Costs: Explaining State Commitment to the International Criminal Court

Thesis directed by Dr. Moonhawk Kim

The International Criminal Court is the first permanent, treaty-based international criminal court established to help end impunity for perpetrators of genocide, crimes against humanity, and war crimes. More than 100 countries have ratified the treaty creating the court. By doing so, they have agreed to cede to an independent prosecutor the power to prosecute the state's own nationals for mass atrocities when the prosecutor and the ICC court determine the state is unwilling or unable to do so domestically. But, why have states committed to an institution like the ICC which has serious enforcement mechanisms to punish noncompliant behavior? States do regularly ratify the many toothless treaties designed to hold states accountable to respecting individual human rights. However, because enforcement mechanisms in those treaties are weak or non-existent, states can show their good will by ratifying, yet ignore treaty terms when compliance becomes inconvenient.

This dissertation examines the puzzle of ICC commitment. I theorize that states will view the ICC's enforcement mechanisms as a credible threat and only commit if their retrospective cost calculations about their ability to comply with treaty terms show that commitment will not lead to a significant sovereignty loss. In this case, states should consider (1) the institutional design of the treaty – specifically, the level of enforcement mechanisms to punish noncompliance and (2) the state's domestic characteristics relating to its ability to comply

with treaty terms. Empirical findings here provide support for the credible threat theory. In contrast to prior studies empirically examining state commitment to international human rights treaties, I find that states with poorer human rights practices are less likely than states with good practices to commit to the ICC. Although this means that member states tend to have relatively good human rights practices, it does not imply that the ICC will not positively influence state behavior. Indeed, the ICC is uniquely situated to improve international cooperation on human rights matters since it has been designed so that commitment requires compliance. All states that have joined the court – including those with poor practices – will have to comply or face sovereignty losses.

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CHAPTER ONE INTRODUCTION

The Puzzle of State Commitment to the International Criminal Court

The creation of the International Criminal Court (the “ICC”) on July 1, 2002 is a remarkable event for many reasons. The existence of the court is the result of a journey that commenced with the Nuremberg trials after the conclusion of World War II and during which nations have searched for ways to ensure that states and individuals protect against, and are deterred from committing, human rights abuses. The idea of a permanent international criminal court dates from at least 1948 when the Genocide Convention referenced the possibility of individuals being tried by “such international penal tribunal as may have jurisdiction.”¹ The International Law Commission (the “ILC”) was tasked with preparing draft statutes for such a permanent court in 1951. However, the Cold War intervened, and it was not until another four decades had passed that the global community again took up the idea of an international criminal court.²

But even after the idea of a permanent international criminal court again became a reality, the 1994 ILC draft statute envisaged a relatively weak institution which would allow states to guard much of their sovereignty. For example, regarding the court’s jurisdiction, the 1994 ILC draft provided that by virtue of ratifying the statute creating the court, states would only confer “automatic jurisdiction” over the crime of genocide.³ For other crimes, such as crimes against humanity and war crimes, all states that could otherwise assert jurisdiction over the matter (for example, the state where the acts were committed or the state with custody over the accused)

¹ Genocide Convention, Art. VI.

² Antonio Cassese, *International Criminal Law*, 2nd Edition (Oxford: Oxford University Press, 2008), 323-28.

³ 1994 ILC Draft, Art. 21. The ILC’s 1994 Draft is available at Report of the International Law Commission on the work of its forty-sixth session, U.N. GAOR, 4^{9th} Sess., Supp. 10, at 44, U.N. Doc. A/49/10 (1994).

would have to consent to conferring jurisdiction upon the international criminal court. As to the initiation of investigations and prosecutions, only states or the Security Council – as opposed to an independent prosecutor – could commence proceedings.⁴ Finally, according to the ILC draft, any permanent member of the Security Council would be able to use its veto power to prevent the ICC from exercising jurisdiction over a matter since no prosecution could be commenced without Security Council approval.⁵

Despite the opposition of some major powers, however, the majority of states rejected this conservative institutional design that preserved state autonomy and sovereignty and instead opted to create an entirely new type of international human rights institution. By the Rome Statute which was adopted in July 1998,⁶ states created an ICC with a strong and independent prosecutor and court with significant and legally-binding enforcement powers to encourage state compliance with the goal of ending impunity for perpetrators of the most serious crimes of genocide, crimes against humanity, and war crimes.⁷ By committing to the Rome Statute, states grant the court automatic jurisdiction over those core crimes.⁸ Moreover, states agree that an independent ICC prosecutor may initiate investigations against their nationals for the covered

⁴ 1994 ILC Draft, Arts. 23 and 25.

⁵ Adriaan Bos, “From the International Law Commission to the Rome Conference (1994-1998), in Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., *The Rome Statute Of The International Criminal Court: A Commentary*, Volume 1 (Oxford University Press: Oxford, 2002), 49-50.

⁶ The Rome Statute was finally adopted in July 1998 during a United Nations conference in Rome. Attending the conference were 160 states, 33 international governmental coalitions, and a coalition of more than 200 non-governmental organizations (“NGOs”). Caroline Fehl, “Explaining the International Criminal Court: A ‘Practice Test’ for Rationalist and Constructivist Approaches,” *European Journal of International Relations* 10 (2004): 362. Of those states in attendance, 120 voted in favor of adopting the statute, seven voted against, and 21 abstained. In July 2002 after the required 60 states had ratified the statute, the ICC came into existence.

⁷ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF 183/9 (1998), Preamble, ¶¶ 4 & 5. At the present time, the crimes over which the ICC does have jurisdiction are genocide, crimes against humanity, and war crimes. Art. 5. The parties to the Rome Statute also declared that the ICC will have jurisdiction over the crime of aggression once a provision is adopted defining that crime and setting out the conditions under which the court can exercise jurisdiction over it. Arts. 5-8. The parties agreed to that definition at the 2010 Rome Statute Review Conference in Kampala. However, the ICC will not be able to exercise jurisdiction over the crime of aggression until after January 1, 2017, and after the parties vote to amend the Rome Statute accordingly. See Resolution RC/Res. 6 at Annex 1, ¶ 2 & 3(3). http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

⁸ Rome Statute, Arts. 5-8, 11, and 12(2).

crimes on his own with the approval of the court or based on referrals from a State Party or the United Nations Security Council.⁹ The prosecutor and court operate without direct United Nations Security Council oversight, with the Council having no veto power over what situations are investigated or prosecuted.¹⁰ In addition, the treaty does not recognize any immunity that states may otherwise grant to heads of state who engage in criminal activity.¹¹

Finally, although it is true that under the “complementarity” provision of the Rome Statute the ICC operates as a court of last resort, the ICC will obtain jurisdiction over the nationals of States Parties where the state is “unwilling or unable genuinely” to proceed with a case.¹² “Unwillingness” includes instances where national proceedings are a sham or are inconsistent with an intention to bring the person to justice, either because such proceedings are unjustifiably delayed or are not being conducted independently or impartially.¹³ The idea behind including the “unwillingness” provision was to preclude the possibility of sham prosecutions aimed at shielding perpetrators due to, for example, government participation in, or complicity with, the offense.¹⁴ A nation’s “inability” to prosecute includes instances where, because of the collapse or unavailability of its national judicial system, the nation cannot obtain the accused or the necessary evidence, or is otherwise incapable of carrying out the proceedings.¹⁵ It bears noting that the ICC – not States Parties – will determine whether the “unwilling or unable” bases for proceeding before the court have been met.

Accordingly, although states initially envisioned creating a weak institution or one

⁹ Rome Statute, Arts. 13-15.

¹⁰ Christopher Rudolph, “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals,” *International Organization* 55 (2001): 679-80; Lionel Yee, “The International Criminal Court and The Security Council: Articles 13(b) and 16,” in *The International Criminal Court: The Making of the Rome Statute*, ed. Roy S. Lee (Springer, 1999), 143-52; Jack Goldsmith and Stephen J. Krasner, “The limits of idealism,” *Daedalus* (2003): 47.

¹¹ Rome Statute, Art. 27.

¹² Rome Statute, Preamble ¶ 10 & Art. 17(1)(a).

¹³ Rome Statute, Art. 17(2).

¹⁴ John T. Holmes, “The Principle of Complementarity,” in *The Making of the Rome Statute*, 50.

¹⁵ Rome Statute, Art. 17(3).

controlled by powerful nations when the idea of the ICC again resurfaced in the early 1990s, during the course of negotiations, the majority of states ultimately determined instead to create an institution with stronger enforcement mechanisms to enforce compliance with treaty terms and punish noncompliant behavior. That the 1998 ICC negotiations produced a stronger institution than what was originally anticipated is interesting. Indeed, as discussed in more detail below, the ICC is different from other human rights treaties that have gone before it since most of those treaties contain weak or non-existent enforcement mechanisms. The ICC is also different from the ad hoc criminal tribunals which are specially created and which are generally imposed by powerful states upon the perpetrators of particular atrocities. Nevertheless, while questions about why and how states decided in July 1998 to create this unique institution with its unique enforcement mechanisms is certainly an interesting question, once states enacted the Rome Statute, its existence became exogenous to each state. The purpose of this study is to better understand the ratification decisions states made given the ICC treaty's particular institutional design.

Thus, the question this dissertation asks is why states would commit to an institution like the ICC inasmuch as commitment can have such profound effects on their sovereign right to mete out justice within their own borders? It is true that the ICC treaty is not the first treaty which purports to bind states to protect individuals against human rights abuses occurring within the state's own territory. And, it is true that states regularly commit to such international human rights treaties. But, those treaties typically contain weak enforcement mechanisms that pose little risk for the state that fails to comply with treaty terms. As such, states can join them almost indiscriminately and without any intention of complying.¹⁶ In the case of the ICC, however,

¹⁶ Oona A. Hathaway, "The Cost of Commitment," *Stanford Law Review* 55 (2003): 1856-57; Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," *Yale Law Journal* 111 (2002): 1982-87; Emilie M. Hafner-Burton

states run the risk that the ICC prosecutor will choose to investigate the state's own citizens and haul those citizens to stand trial at an international criminal court situated in The Hague.

Therefore, while it may be reasonable for states to commit to treaties with weak enforcement mechanisms, the fact that more than 100 states have now committed to the ICC and its strong enforcement mechanisms poses a puzzle.¹⁷

That more than 100 states have ratified the ICC treaty is puzzling because states typically guard their sovereignty and are reluctant to join international treaties with strong enforcement mechanisms – particularly if they cannot comply with treaty terms. Can we expect that the more than 100 states that have ratified the ICC treaty all will abide by treaty terms and protect against human rights abuses and/or domestically prosecute any of their citizens who perpetrate mass atrocities? Does the fact that these states willingly committed to an international human rights treaty with relatively strong enforcement mechanisms mean that they are also committed to the goal of ending impunity for perpetrators of mass atrocities? After all, the intent of strong enforcement mechanisms must be to enforce compliance with treaty terms – in this case by ensuring that perpetrators of mass atrocities are brought to justice and other potential perpetrators are deterred as a result.

On the other hand, approximately 90 states are still not parties to the ICC treaty, and some states that do belong to the court ratified the treaty less swiftly than others. Why did these states fail to ratify the Rome Statute or ratify more slowly than others? Given the treaty's

& Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," *American Journal of Sociology* 110 (2005): 1374.

¹⁷ As of October 2010, some 139 countries had signed the Rome Statute, and 114 had actually become States Parties to it. Of the States Parties, about 20 are from Western Europe, 17 are from Eastern Europe, 31 are from Africa, 14 from Asia, and 25 are from Latin America and the Caribbean. The United States, Israel, China, Russia, Indonesia, and India are notable powerful states that have declined to ratify the treaty. Also not parties to the treaty are a number of Islamic and African states, including Bahrain, Iran, Iraq, Kuwait, Pakistan, Qatar, Syria, Turkey, United Arab Emirates, Yemen, Algeria, Angola, Cameroon, Cape Verde, Cote d'Ivoire, Egypt, Morocco, Sudan, Tunisia, and Zimbabwe. In June 2010, Bangladesh became the first country from southern Asia to join the court.

relatively strong enforcement mechanisms, should we expect that states with the worst human rights practices are among the states that have not ratified? For these states, joining international human rights treaties with weak enforcement mechanisms may be in their rational self-interest. Joining the ICC, however, is a different matter. But, if the majority of states joining the court are also those that already have the best human rights practices, can the ICC really have a significant impact on improving universal respect for human rights and deterring mass atrocities?

This dissertation explores these questions and seeks to understand the puzzle of state commitment to the ICC. By exploring this puzzle, this dissertation will contribute to our understanding of why states joined or refused to join the ICC. In addition, the dissertation should also contribute to our understanding of how institutional design – and enforcement mechanisms in particular – affects state commitment and compliance in the context of the international human rights regime more broadly. Understanding commitment and also why states refuse to commit is important for evaluating the role of international human rights treaties and state ratification of those treaties in bettering state human rights practices and ending impunity for those who abuse individual human rights.

Moreover, this study is unique in that it examines the puzzle of ICC commitment using both quantitative methods and qualitative case studies. Indeed, few studies have empirically examined the puzzle posed by state commitment to the ICC treaty, and none have specifically examined whether and how the apparently strong enforcement mechanisms associated with the treaty creating the court influence state commitment decisions.¹⁸

¹⁸ Moreover, the few studies that do empirically examine state commitment to the ICC posit different theories, employ different dependent variables in different empirical models, and reach different conclusions about what variables are and are not driving ICC state behavior. See Beth A. Simmons and Allison Danner, “Credible Commitments and the International Criminal Court,” *International Organization* 64 (2010): 240-46 (arguing that non-democracies with recent civil wars are most likely to commit to the ICC because they want to tie their own hands and limit their ability to commit mass atrocities); Jay Goodliffe and Darren Hawkins, “A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations,” *The Journal of Politics* 71

The Argument: Strong Enforcement Mechanisms as a Credible Threat

Building on existing scholarship,¹⁹ I theorize that commitment to international human rights treaties is a function of two considerations relative to the costs of noncompliance: (1) the institutional design of the treaty – specifically, the level of enforcement mechanisms to punish noncompliance – and (2) the state’s domestic political characteristics relating to its ability to comply with treaty terms.

Traditionally, international human rights have been designed with weak enforcement mechanisms. For example, most require only that states self-report compliance.²⁰ Even the additional optional enforcement mechanisms contained in some treaties – whereby states agree to accept state or individual complaints alleging noncompliance – are far from strong.²¹ In fact, the committees who review the complaints are not empowered to issue decisions that are actually

(2009): 977 (arguing that a state’s dependence networks are a primary influence on ICC commitment); Judith Kelley, “Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements,” *American Political Science Review* 101 (2007): 573 (testing ICC commitment preliminary to the study’s main focus on determining why states that joined the ICC would also sign or refuse to sign bilateral immunity agreements with the United States).

¹⁹ Oona Hathaway is generally credited with first examining empirically the relationship between state human rights ratings and their tendency to enter into international human rights treaties. However, in her 2003 study, the only variables she used to test treaty commitment to several human rights treaties were a state’s human rights ratings and whether or not it was a democracy – without accounting for the timing of ratifications. Although she acknowledged that other variables may influence commitment, she purposely limited her study. Hathaway, “The Cost of Commitment,” 1849. In a later study, Hathaway included some additional variables testing commitment to several human rights treaties using a Cox proportional hazards model, though her study did not include the ICC. Oona A. Hathaway, “Why Do Countries Commit to Human Rights Treaties?,” *Journal of Conflict Resolution* 51 (2007): 588.

²⁰ For example, under the International Covenant on Civil and Political Rights (the “ICCPR”), states agree to submit reports on the measures they have undertaken to give effect to the matters addressed in the Covenant. ICCPR, Art. 40. The main treaties of the five other international human rights treaties similarly provide only that states self-report compliance. International Covenant on Economic and Social Rights (the “ICESCR”), Arts. 16 & 17; International Convention on the Elimination of All Forms of Racial Discrimination (the “CERD”), Art. 9; The Convention on the Elimination of All Forms of Discrimination Against Women (the “CEDAW”), Arts. 18 & 21; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”), Art. 19; and the Convention on the Rights of the Child (the “CRC”), Art. 44.

²¹ For example, under Articles 21 and 22 of the CAT, states recognize the competence of the Committee Against Torture to hear complaints by states and individuals, respectively. Under Article 41 of the ICCPR, states may agree to recognize the competence of the United Nations Human Rights Committee to consider complaints of one state against another claiming the party is not fulfilling its obligations under the treaty.

binding on the states.²² At least some scholars have suggested that these traditionally weak enforcement mechanisms may explain why states with poor domestic human rights practices nevertheless ratify these treaties designed to protect and promote human rights.²³ Even states with poor domestic practices may view commitment to these treaties as essentially costless from a sovereignty standpoint simply because the treaty enforcement and monitoring mechanisms are weak.²⁴ In short, the indirect – and sometimes intangible benefits – associated with appearing to be a state that embraces international human rights norms may outweigh the costs of commitment where treaty enforcement mechanisms to punish noncompliant behavior are weak or non-existent.

However, as compared to the international human rights treaties that have preceded it, the ICC treaty has a unique institutional design. It contains relatively strong enforcement mechanisms in that it delegates enforcement authority to an independent decision-making body with resources that can be used to prevent abuses or punish offenders. If states view the enforcement mechanisms associated with the ICC treaty as strong enough to pose a credible threat to their sovereignty, they should only commit if their retrospective calculations about the costs of complying with treaty terms suggest that the risks to their sovereignty by joining the court are minimal. First and foremost, compliance with ICC treaty terms requires that the state have good human rights practices since the state can best avoid the specter of an ICC prosecution if its leaders and citizens do not commit the kinds of mass atrocities within the court's jurisdictional purview. As a secondary matter, states can also comply with ICC treaty terms and avoid having their citizens tried in The Hague if they have independent domestic law

²² In the instances described above, the Committee's enforcement mechanism is limited to attempting to facilitate a resolution or providing a report of its findings. See CAT, Arts. 21 & 22(7); ICCPR, Art. 42.

²³ Hathaway, "The Cost of Commitment," 1825; Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World," 1378.

²⁴ Hathaway, "The Cost of Commitment," 1838-40.

enforcement institutions that are also capable of prosecuting any human rights violations within their own states.

As such, good human rights practices and independent and capable domestic law enforcement institutions are each individually sufficient for states to conclude that ratifying the ICC treaty will not be overly costly. Thus, if a country has either good human rights practices or independent and capable domestic law enforcement institutions, it should conclude that ICC ratification is relatively costless and should commit to the court. In addition, for a state to conclude that ratification of the ICC is essentially costless because the state can comply with treaty terms, either good human rights practices or independent and capable domestic law enforcement institutions are a necessary condition to ratification. However, because the ICC is able to scrutinize whether member states' domestic prosecutions are adequate to ward off an ICC investigation, I suggest that good human rights practices become almost a necessary condition to ratification. Indeed, states concerned about compliance costs may not want to rely only on their own assessment of the independence and capability of their domestic institutions and would be wise to insure that their human rights practices are sufficiently good before committing to the court. On the other hand, a state with weak domestic institutions could nevertheless conclude that commitment to the ICC treaty would be relatively costless as long as the state's human rights practices are good. Of course, even states that meet these conditions may decline to commit to the ICC for other reasons.

Accordingly, I predict that states with better human rights practices and independent and capable domestic law enforcement institutions will view the costs of complying with the ICC treaty's terms as relatively minimal and more readily commit to the court. In fact, because the primary way in which states can avoid an ICC investigation and prosecution is by having

relatively good human rights practices, even with weak domestic law enforcement institutions, those states should conclude that the costs of ICC commitment will be relatively minimal. States with poor human rights practices and biased or incapable domestic law enforcement institutions, however, should view commitment to the ICC treaty as costly – even if previous studies suggest they regularly commit to other international human rights treaties. Indeed, even with independent and capable institutions (and there may be few states with such characteristics, in any event), a state with poor human rights practices may view the costs of compliance as being significantly high that it will refuse to commit to the court.

This study focuses on the costs associated with ICC commitment, rather than any benefits states may receive as a result of joining the ICC, precisely because the ICC's relatively strong enforcement mechanisms can result in a significant loss of state sovereignty. As a preliminary matter, it is worth noting that on the whole, international human rights treaties are different from other treaties – like arms control agreements and trade agreements – which by their very terms provide tangible reciprocal benefits to states in exchange for their pledge to act in particular ways.²⁵ But, the ICC treaty is different even from other international human rights treaties because it has relatively strong enforcement mechanisms that can punish noncompliant behavior. Thus, while states might still behave rationally by ratifying toothless international human rights treaties solely because ratification can provide them some intangible benefits (such as the feelings associated with being a legitimate member of the world community) or indirect benefits (such as increased aid or trade), states should be less likely to approach ICC ratification by focusing primarily on such potential benefits. In short, although states might still hope to gain some benefits from joining the ICC and signaling their legitimacy as a state that respects and protects human rights, for a state that cannot comply with the ICC treaty's terms, any of those

²⁵ Hathaway, "The Cost of Commitment," 1823.

uncertain benefits will be overwhelmed by the sovereignty costs associated with noncompliance. Thus, I expect states will first calculate the potential costs of commitment and forgo those potential intangible and indirect benefits unless they can and will comply with treaty terms.

I particularly focus on the compliance costs derived from the specific language of the text of the ICC treaty – rather than any costs of commitment that may be unrelated to the treaty’s precise terms (for example, the costs associated with a state’s domestic ratification processes) – for several additional reasons. First, in all cases of treaty ratification, one primary guide of a state’s obligations and the risks associated with failing to comply with those obligations is the terms and provisions of the treaty. Second, in the case of the ICC, the institutional design of the treaty and its enforcement mechanisms are unique. This is not a case where states can look to other similar treaties or the actions of treaty bodies that oversee compliance with other similar treaties to help them interpret the actual strength and meaning of a treaty’s enforcement mechanisms. In addition, by contrast to the previous international human rights treaties which contain only weak enforcement mechanisms, states should inherently have something to fear from an independent prosecutor and court. And, while states that wait to ratify the ICC may be able to look at the actions of the ICC prosecutor and the court to help them determine whether the treaty’s enforcement mechanisms are actually as strong as they appear to be on paper, states that ratified promptly had only the treaty text on which to rely when making their commitment decisions.

Finally, I focus specifically on the costs associated with complying with treaty terms because in the international human rights context (and others as well), a treaty’s institutional design and its enforcement mechanisms can have implications for understanding state behavior and also the likelihood that the treaty’s purposes and goals will be realized. The ICC treaty has

an institutional design and enforcement mechanisms that set it apart from other prior international human rights treaties. Presumably, states structured the ICC treaty in this way because they wanted to ensure compliance with its terms and deter human rights abuses by ending the culture of impunity whereby domestic governments either commit such abuses or fail to bring to justice those within their jurisdiction who perpetrate atrocities. Knowing why states commit to such a regime, and the kinds of states that commit to such a regime, should provide insights about whether structuring international human rights treaties with stronger enforcement mechanisms can ensure greater compliance with international human rights norms.

Research Design

I use a mixed methods research design to test the credible threat theory. Using event history analysis and case studies, I examine whether states view the ICC's enforcement mechanisms as a credible threat and actually engage in retrospective cost calculations about their ability to comply with treaty terms and provisions – and, as such, their level of human rights practices and the independence and capability of their domestic law enforcement institutions – when making commitment decisions. The quantitative analyses test state commitment to the ICC drawing on a database that includes more than 190 countries over the time period between 1998 and 2008. Although it is not, nor could it be, conclusive, the empirical evidence provides support for the idea that states view the ICC's enforcement mechanisms as a credible threat and more readily join the court when their retrospective calculations about their ability to comply with treaty terms indicates that commitment will not impose significant sovereignty costs. The results indicate that states with better human rights practices are more likely than states with poorer human rights practices to commit to the court. In addition, although the evidence is less conclusive about the role domestic law enforcement institutions play in state ratification

decisions, there is evidence showing that democracies are more likely to commit to the court – even the relatively few democracies with poorer human rights practices. This finding provides support for the idea that states that already have checks on government power, such as through independent judicial institutions, view commitment to the ICC as less costly. Thus, these states have less to fear from the additional threat of an ICC prosecution since they should expect that they or their citizens would be prosecuted in any event if they committed the kinds of mass atrocities within the ICC’s jurisdiction.

The quantitative tests comparing state decisions to commit to the ICC with state decisions to commit to 13 other international human rights treaties, articles, and/or optional protocols – which I arrange according to their level of enforcement mechanisms – provide further support for the credible threat theory. The results of event history analysis for the years between 1966 and 2008 show that states commit to treaties with the weakest enforcement mechanisms (state reporting) willingly and regularly, but without regard to their level of human rights practices. Rather, the empirical examination of state commitment to six different human rights treaties with the same weak enforcement mechanism suggests that states view treaties with weak enforcement mechanisms as costless and commit for the purpose of “window dressing” only and without regard for compliance concerns.²⁶ The results of tests of ICC commitment are in stark contrast to these findings. A state’s human rights ratings are a highly significant and positive predictor of whether a state will join the ICC treaty and risk running afoul of its relatively strong enforcement mechanisms. Thus, where enforcement mechanisms are relatively strong, the empirical evidence indicates that calculations about the costs of commitment are significantly influencing states’ ratification behavior.

I use case studies to add depth and understanding to the empirical findings by tracing the

²⁶ Hafner-Burton and Tsutsui, “Human Rights in a Globalizing World,” 1374.

historical and political processes underlying state ratification behavior, particularly as they relate to a state's ability to comply with treaty terms and the calculations states make in that regard.

The four cases selected for study demonstrate variance on the dependent variable of ICC commitment and also on the main independent variables of interest: a state's level of human rights practices and the quality of its domestic law enforcement institutions. In addition, the cases for individual study both fit and do not fit my theoretical expectations. For example, both Germany and Trinidad and Tobago have had consistently good human rights practices since the ICC treaty was available for ratification in 1998. Germany also has independent and capable domestic law enforcement institutions; Trinidad and Tobago's institutions, however, are somewhat weak. Both countries promptly ratified the ICC treaty, and the evidence suggests that they did so based on rational and backward-looking calculations about the costs of compliance – which for both countries were minimal given their relatively good human rights practices.

On the other hand, both Rwanda and Kenya have had, and continue to have, poor human rights ratings and biased and/or weak domestic law enforcement institutions. Rwanda did not ratify the ICC – which is behavior consistent with theoretical expectations because the country's past and present human rights records and its relatively weak domestic law enforcement institutions indicate it may have difficulty complying with treaty terms. Furthermore, the case study analysis indicates that the costs associated with ICC compliance best explain Rwanda's refusal to commit to the court. By contrast, Kenya did join the ICC in 2005 – a decision which is inconsistent with the expectations of the credible threat theory since even at that time, Kenya's prospects for compliance with ICC treaty terms were at least uncertain. And, Kenya has not complied with treaty terms. Rather, Kenya has become the subject of the ICC's most recent case, and the prosecutor has charged six suspects with instigating violence following the

December 2007 election of Kenya's current president, Mwai Kibaki, which violence resulted in the deaths of more than 1000 people.

Organization of the Dissertation

In Chapter Two, I review the existing literature on commitment to international human rights treaties generally, and the international criminal court in particular. In this chapter, I expand on the credible threat theory, and suggest that even though prior studies have shown that states often ratify international human rights treaties without regard to their ability to comply, states making ICC ratification decisions should be guided primarily by retrospective calculations about the costs of complying with treaty terms given the strong and legally-binding nature of the ICC treaty's enforcement mechanisms.

The next two chapters are quantitative tests of the credible threat theory. In Chapter Three, I empirically examine state commitment to the ICC using event history analysis. Employing a database of over 190 states for the period from 1998 to 2008, I examine the extent to which both constant and time-varying factors influence the probability that a state will ratify the ICC treaty in a given time period. As noted above, those results provide support for the credible threat theory and the idea that compliance costs influence ICC ratification behavior in that the human rights practices measure is a highly significant and positive predictor of whether or not a state will join the ICC.

In Chapter Four, and to provide additional context for the findings regarding state commitment to the ICC, I quantitatively examine state commitment to the ICC in the comparative context of 13 other international human rights treaties, articles, and/or protocols. Again, as noted above, the results of event history analysis for the period between 1966 and 2008 provide additional support for the credible threat theory. I find that states with poor human

rights ratings regularly ratify treaties with the weakest enforcement mechanisms. Those states, however, are less likely to readily ratify the ICC treaty.

Chapter Five serves as an introduction to the case study chapters and explains the logic of case study selection. More particularly, it explains the additional implications of the credible threat theory I examine through an in-depth analysis of a country's ratification behavior. For example, unlike the quantitative chapters which study the state's ratification behavior at a particular point in time, through the qualitative analyses, ratification behavior can be studied over time. Through the case studies, we can see whether state ratification decisions are influenced by any changes in domestic behavior, attitudes, or institutions. In addition, although the results of the empirical analyses indicated that cost of compliance calculations did influence ICC ratification behavior, the qualitative analyses will permit a more complete exploration of those calculations and any trade-offs states make when considering commitment. Finally, and among other things, the case studies allow us to focus on states' post-ratification behavior. If states are truly concerned with the ICC's strong enforcement mechanisms and the costs of compliance, then we should see post-ratification efforts to comply. In sum, the case study chapters should allow for a better and deeper understanding of the inferences derived from the quantitative analysis since they will go beyond correlation arguments.

The four chapters that follow are case studies of Germany, Trinidad and Tobago, Rwanda, and Kenya. Chapter Six examines Germany's decision to ratify the ICC in historical and political context – which historical context is particularly interesting in that it suggests that Germany's ratification of the ICC should not be taken for granted. Not long ago, Germany was a country with terrible human rights practices and domestic institutions that were complicit in furthering government policies designed to abuse – rather than protect – human rights. During

those times, Germany was hostile to the idea of punishment and a role for the world community in implementing that punishment, and it avoided international human rights treaties with stronger enforcement mechanisms. However, in recent decades, and after Germany's human rights practices improved and its domestic law enforcement institutions began enforcing the rule of law, Germany began showing an interest in – and committing to – international human rights treaties with stronger enforcement mechanisms. And, while one might expect that Germany might feel pressured to join the ICC because of its history and so as to signal its intention to remain a legitimate state, the case study shows that Germany did not join because of pressure. Rather, Germany took a leadership role in arguing for a strong and independent prosecutor and court and it promptly committed to the court. Indeed, the case study of Germany provides support for the credible threat theory because it shows that Germany committed to the Rome Statute and its strong enforcement mechanisms only after concluding that ICC compliance costs would be minimal, meaning that Germany would likely not suffer a loss of sovereignty by having its citizens prosecuted in The Hague.

In Chapter Seven, I turn to Trinidad and Tobago, a state instrumental in pushing for a permanent international criminal court. But, Trinidad and Tobago had suggested a court to help it deal with narcotics trafficking problems. Nevertheless, the country promptly committed to the ICC even though at the conclusion of the Rome Conference, states voted to include within the court's jurisdiction only the crimes of genocide, crimes against humanity, and war crimes. Case study analysis helps explain why Trinidad and Tobago promptly committed to the ICC even though the court was not the one it initially envisioned. In fact, although many of the country's statements suggest it committed because it believed in the norms advanced by the Rome Statute, the record shows that Trinidad and Tobago did not put norms before compliance concerns. The

evidence shows that Trinidad and Tobago carefully guards its sovereignty and does not commit to treaties that run counter to its domestic interests or with which it has no intention of complying. At present, for example, the country is only a party to the international human rights treaties with the weakest enforcement mechanisms that require self-reporting. And, the evidence shows that Trinidad and Tobago was equally as concerned with its sovereignty and the costs of compliance when deciding to commit to the ICC. Although Trinidad and Tobago has narcotics trafficking problems, its government and its citizens have no history of committing the kinds of mass atrocities that would subject the country to the ICC's relatively strong enforcement mechanisms and the concomitant risks to its sovereignty. Therefore, since Trinidad and Tobago would be unlikely to suffer a loss of sovereignty by ratifying the ICC treaty, it could commit to the court and also be able to present itself to the world community as a legitimate state that respects international human rights norms.

Chapter Eight's case study examining Rwanda's behavior tests the explanatory power of the credible threat theory in the context of a state with poor human rights practices and weak domestic law enforcement institutions. It also compares the explanatory power of the credible threat theory to that of the other primary theory discussed in the literature which also attempts to explain the ICC ratification behavior of states with poor human rights practices – the credible commitment theory. According to the credible commitment theory (advanced by Beth Simmons and Allison Danner), states with poor human rights practices, but that are also non-democracies, will commit to the ICC so as to tie their hands to act as they wish and demonstrate to their domestic audience their commitment to end a cycle of violence and impunity. The case study of Rwanda, however, shows that non-democracies with poor human rights practices – and leaders who have concentrated power – are not necessarily likely to commit to the ICC in order to tie

their hands and demonstrate to their domestic audiences an intention to respond non-violently to crises or to end any prior cycle of impunity. Contrary to the predictions of the credible commitment theory, the case study shows that Rwanda's leader, President Kagame, does not want to surrender any of his power to the ICC. In fact, he wants no constraints on his power to rule domestically as he sees fit – even if that means using violence and allowing perpetrators of certain acts of violence to escape justice. Even though some in the international community have severely criticized Kagame for failing to hold his soldiers sufficiently accountable for acts of violence committed during the 1994 genocide and thereafter, he continues to maintain that he – and Rwanda – should be the judge of what justice is proper in Rwanda for acts involving its citizens.

Thus, Rwanda has not ratified the ICC treaty, and the evidence indicates that it has not done so because commitment would be costly from a sovereignty standpoint. Rwanda continues to be a country with poor human rights practices and institutions that do not necessarily follow the rule of law. And, just as Rwanda has generally declined to commit to other international human rights treaties with stronger enforcement mechanisms, it rationally engaged in retrospective calculations about whether it could comply with the ICC treaty's terms and avoided committing to a treaty with which it may not be able to comply and which could impose significant costs on its sovereign rights to rule and administer justice as it believes is necessary and warranted given its history. For Rwanda, commitment to the ICC could result in a significant loss of sovereignty, not only because it might commit the kinds of atrocities covered by the ICC treaty, but also because President Kagame would have to surrender some of his power to make his own determinations about what persons and what actions are actually deserving of judicial punishment.

Finally, in Chapter Nine, I examine Kenya's decision to join the court in 2005, notwithstanding the fact that for many years – and today – Kenya's human rights ratings and the quality of its domestic law enforcement institutions are both poor. An in-depth analysis of the Kenyan case is important for further exploring the explanatory power of the credible threat theory and understanding why states commit to the court even when the evidence indicates that the compliance costs associated with commitment are apparently significant. In addition, because Kenya has consistently had poor human rights practices, and because it was a non-democracy until 2002, the Kenyan case study allows for a test of the explanatory power of the credible commitment theory as well.

Here, although the case study shows that Kenya's decision to ratify the Rome Statute in 2005 is inconsistent with the credible threat theory, it also shows that Kenya's ratification behavior is inconsistent with the credible commitment theory. Kenya committed to the ICC in 2005 – after it became a democracy and after it had made some domestic reforms – such as an increased role for civil society – which provided some checks on the president's previously unlimited power to govern as he saw fit. And, the record reveals that both the domestic civil society and the international community played a role in convincing Kenya's leadership to commit to the ICC. But, contrary to the predictions of the credible commitment theory, Kenya did not thereafter embrace the ICC's potential hand-tying mechanisms and commit to ending any cycle of violence and impunity. As noted above, the record shows unequivocally that Kenya did not normatively change to the degree necessary to ensure its ability to comply with the ICC treaty. Because of ethnic-based violence in the aftermath of Kenya's 2007 presidential elections in which governmental leaders and the police participated, and because Kenya has not

domestically held the perpetrators of that violence accountable, Kenya has become the ICC's most recent case.

Nevertheless, although Kenya was selected for case study analysis precisely because its ratification behavior was apparently inconsistent with the credible threat theory given its poor human rights practices, that analysis has actually produced evidence showing that Kenya was – and is concerned – with the ICC's relatively strong enforcement mechanisms and the costs of failing to comply with treaty terms. First, Kenya failed to ratify the Rome Statute for another six years after signing the treaty in 1999. During all of that time period, the evidence shows that Kenya had poor human rights practices and weak domestic law enforcement institutions. And, the evidence further shows that Kenya has generally avoided international human rights treaties with stronger enforcement mechanisms – a fact which is not only consistent with the credible threat theory, but also consistent with the idea that Kenya refused to ratify the ICC treaty for so many years because it was concerned with the costs of complying with treaty terms.

Second, Kenya's behavior after ratifying the ICC treaty in 2005 also shows that Kenya is concerned with the ICC's relatively strong enforcement mechanisms and the costs of failing to comply with treaty terms. Specifically, in connection with the ICC investigation into the 2007 post-election violence, Kenya's actions have demonstrated that it does not now want to be bound to a treaty which is imposing significant costs on its sovereignty. Not only has the government failed to hold those responsible for the post-election violence accountable, but it has also failed to fully cooperate with the ICC's recommendations and its investigation.²⁷ In fact, Kenya's response to the prosecutor's announcement that he was charging six prominent Kenyans with having committed crimes against humanity for their roles in the 2007 post-election violence

²⁷ ICC Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," (March 31, 2010), ¶¶ 183-186, available at <http://www.icc-cpi.int/iccdocs/doc854287.pdf>.

serves to further demonstrate that Kenya does not want to be subjected to costly compliance. Indeed, since the prosecutor announced the six suspects, Kenya has been on a campaign designed to release itself from its costly commitment. For example, in December 2010, the legislature voted to withdraw from the ICC – although time will only tell if Kenya will do so.²⁸ For all of these reasons, Kenya’s actions both before and after commitment show a country that is concerned with compliance costs and which does not want to be subjected to the ICC’s relatively strong enforcement mechanisms.

In the Conclusion in Chapter Ten, I address implications and how to structure international treaties so that states perceive them as credible threats to punish bad and noncompliant behavior. I argue that the implication of both the quantitative and qualitative evidence is that where enforcement mechanisms are stronger, states take their commitment to human rights treaties more seriously, and more often than not, commit based on retrospective calculations about their ability to comply with treaty terms. Indeed, although states with poor human rights practices regularly and readily commit to international human rights treaties with weak enforcement mechanisms, on the whole, they are more wary of committing to the ICC.

The empirical evidence further suggests that, on the whole, states only view the very strongest enforcement mechanisms as a credible threat. Accordingly, if we hope to improve states’ domestic human rights practices using international human rights treaties, we should structure those treaties with “hard law” enforcement provisions that are clear, precise, binding, and backed by resources to coerce compliance and punish noncompliance. Although one effect may be that fewer “bad” states will join international human rights treaties since they will view

²⁸ Kevin Jon Heller, “Kenya Moves Closer to Withdrawing from the ICC,” *Opinio Juris*, Dec. 12, 2010, <http://opiniojuris.org/2010/12/23/kenya-moves-closer-to-withdrawing-from-the-icc/>; “PM Says Kenya Will Not Withdraw From ICC,” *VOANews.com*, Dec. 23, 2010; Alphonse Shiundu, “MPs’ vote sets stage for Kenya to cut ties with ICC,” *Daily Nation*, Dec. 24, 2010.

commitment as costly, it may be something of a distinction without a difference. Studies show those same “bad” states join treaties with weak enforcement mechanisms, but thereafter do not improve their practices.

In any event, even if fewer states with poor human rights practices join the ICC than join other international human rights treaties, this does not imply that the ICC and its strong enforcement mechanisms will play no role in improving human rights practices or insuring that perpetrators of mass atrocities are punished. First, because of the ICC’s relatively strong enforcement mechanisms, even states with good human rights practices will have reason to insure that their practices remain good or improve so as to avoid running afoul of treaty terms. Second, the ICC’s jurisdictional reach extends beyond States Parties since the United Nations Security Council is able to refer cases to the court – as it has done with both the Sudan and, very recently, Libya. Accordingly, the existence of the ICC and its independent prosecutor and court should stand as a warning to all states that human rights abuses will not be tolerated, and will instead be punished.

Finally, the evidence shows that like Kenya, other states with bad human rights practices have joined the ICC. Like Kenya they will realize, if they have not already, that an unintended consequence of ICC commitment may be that they will have to improve their bad human rights practices or face a costly loss of sovereignty to the ICC. Unlike the many other treaties which are designed to induce compliance with international human rights norms, the ICC has strong enforcement mechanisms to punish bad and noncompliant behavior. In short, the good news is that when the “bad” states like Kenya join the ICC, the ICC can use its strong enforcement mechanisms to bring about good results. Indeed, it seems that one way or another, because Kenya joined the ICC, at least six of the alleged perpetrators of the 2007 post-election violence

will be prosecuted. There seems little point of continuing with the traditionally toothless regime that encourages “bad” states to commit to international human rights treaties, but that has no power to insist on positive change.

CHAPTER TWO

THEORIES OF COMMITMENT

Existing Literature

Although little scholarly research empirically tests the question of why states commit to the treaty creating the ICC, ample literature examines and tests state decisions to join international institutions, including international human rights treaties. I group this literature according to its theoretical underpinnings as follows: “the rationalist view” and “the normative view.” The rationalist view assumes that states are self-interested actors behaving based on the logic of consequences. Under this view, states commit to treaties where the costs of commitment are low or where the costs of commitment are otherwise outweighed by some benefits that may be derived from joining the treaty. By contrast, under the normative view, states may ratify human rights treaties even if commitment is costly – for example, because at that moment they are unable to comply with treaty terms. Ratification of treaties embracing positive norms may simply be the appropriate thing to do if a state is to be viewed as legitimate.²⁹ Of course, states may also conclude that doing what is appropriate and embracing the norms favored by other important or influential actors provides additional benefits as a result of being viewed as legitimate. For example, by ratifying human rights treaties, states may be able to reap uncertain, extra-treaty benefits, including increased aid or trade.

The Rationalist View

Under a rationalist view, states engage in cost/benefit calculations and join those treaties

²⁹ James C. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press, 1989), 160-62.

that are least costly and most beneficial to them.³⁰ Those costs and benefits will often be incurred or derived in the future after ratification. However, states' pre-ratification determinations regarding any future costs and benefits may be based on calculations that are more or less retrospective or prospective in nature. As discussed below, according to some theories, states will, and can, determine the likely consequences of treaty commitment by looking to their past practices and actions. On the other hand, according to some theories, the treaty's potential to influence state practices and actions in the future may impose costs or benefits that will guide state determinations about the consequences of treaty ratification.

Retrospective Calculations

Compliance Costs: Domestic Practices and Policies

The most direct costs associated with treaty ratification, and costs that a state will likely calculate by looking backwards at its recent past practices and policies, are those related to complying with treaty terms. According to George Downs, David Rocke, and Peter Barsoom, most governments prefer to guard against restrictions on their sovereignty, and thus, will avoid costly commitments – namely commitments to institutions with which they cannot comply.³¹ Indeed, these scholars suggest the reason we may see widespread compliance with at least some treaties is because states will not negotiate or join treaties that require “deep” cooperation – meaning cooperation that would require the state to depart from what it otherwise would have done in the absence of the treaty.³² Therefore, states wishing to guard their sovereignty and avoid costly decisions will have incentives to look backwards to determine whether their

³⁰ Andrew T. Guzman, “A Compliance-Based Theory of International Law,” *California Law Review* 90 (2002): 1860.

³¹ George W. Downs, David M. Rocke, and Peter M. Barsoom, “Is the Good News about Compliance Good News about Cooperation?,” *International Organization* 50 (1996): 383.

³² Downs, Rocke, and Barsoom, “Is the Good News about Compliance Good News about Cooperation?,” 383.

practices and policies are consistent with those required by the terms of the treaty. To the extent their practices and policies are consistent, states should commit to the treaty since compliance costs – and the concomitant loss to state sovereignty – should be minimal.³³

In the case of international human rights treaties, a state's domestic political realities and its prevailing human rights practices should best predict its compliance costs, which will in turn affect the state's willingness to commit to the treaty. First, regarding the state's domestic political configuration, democratic states generally protect basic human rights, apply the rule of law fairly, and limit state power. Consequently, for those states, state policies should be such that ratification of human rights treaties will not affect the status quo *ante*.³⁴ Autocratic regimes, on the other hand, tend not to place legal restraints on their own power. Therefore, because they have not in the past committed to protecting human rights or limited their own ability to respond violently to crises, these states may conclude that ratifying human rights treaties poses significant risks to their sovereignty: if they maintain the status quo *ante*, they risk failing to comply with treaty terms.³⁵ Aside from their political configuration, however, states with a recent history of better domestic human rights practices should also be more likely to ratify treaties protecting human rights. For these states, too, the costs of noncompliance – and the risks to state sovereignty – should be low.³⁶

Along these same lines, Christine Wotipka and Kiyoteru Tsutsui argue that compliance with human rights norms may be easier for wealthier and more developed countries.³⁷ They note that economically developed countries tend to be more politically stable and also have citizens

³³ Ibid.

³⁴ Wade M. Cole, "Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999," *American Sociological Review* 70 (2005): 475-76.

³⁵ Cole, "Sovereignty Relinquished?," 475-76.

³⁶ Cole, "Sovereignty Relinquished?," 475-76; Christine Min Wotipka & Kiyoteru Tsutsui, "Global Human Rights and State Sovereignty: States Ratification of International Human Rights Treaties, 1965-2001," *Sociological Forum* 23 (2008): 737.

³⁷ Wotipka and Tsutsui, "Global Human Rights and State Sovereignty," 737.

who embrace progress and post-materialist values – such as the need to protect citizens against human rights abuses.³⁸ Governments in states that are economically healthy may also already have in place the policies permitting easy compliance with most international human rights treaties. On the other hand, countries that are less economically developed may not be able to devote sufficient resources to ensuring that human rights are observed, particularly if the economic situation also leads to violence or political instability. Those states may find compliance with international human rights treaties would require a substantial commitment to policy change – a fact which may cause them to avoid ratifying.

The nature and terms of the ICC treaty, however, may impose additional compliance costs on states than might some other international human rights treaties. Because the crimes covered by the ICC include “war crimes,” states with a greater military presence may be more at risk for prosecution of their citizens – and therefore view ICC ratification as more costly – than states with a smaller military presence. For example, the United States argued during negotiations that its military forces should be exempted from ICC jurisdiction because those forces were present throughout the world, were critical to international peace and security, and would be more exposed to accusations of wrongdoing than would citizens of other states with less international military involvement.³⁹ Therefore, even though a state is a democracy and otherwise protects human rights, states that have a larger military presence within the world community may also find compliance with the ICC treaty is more costly and requires more

³⁸ Ronald Inglehart, *Silent Revolution: Changing Values and Political Styles Among Western Publics* (Princeton: Princeton University Press, 1977); Ronald Inglehart, *Culture Shift in Advanced Industrial Society* (Princeton: Princeton University Press, 1990).

³⁹ Benjamin N. Schiff, *Building the International Criminal Court* (New York: Cambridge University Press, 2000), 161.

policy change (perhaps in the form of military training) than would states with a smaller military presence.⁴⁰

Finally, the costs of complying with international human rights treaties is reduced even for states with practices and policies that do not conform to treaty terms where the mechanisms designed to enforce compliance are weak or nonexistent.⁴¹ For example, where treaties require only that states self-report compliance, the punishment states face for failing to report or reporting poor conduct is negative comments by the treaty's committee members. Of course, states may further risk comments by other states and non-governmental organizations ("NGOs") when they violate human rights in their territories, but this is a risk they probably face even absent ratification of a human rights treaty. Because treaties with weak enforcement mechanisms are not designed to make states accountable for their commitments, even rights-abusing governments may readily bind themselves to international treaties designed to promote and protect human rights.

Indeed, as noted above, a number of studies have found that states with poor human rights practices are just as likely as states with good practices to bind themselves to treaties which require them to protect human rights, but that those states thereafter do not change their poor practices. For example, Oona Hathaway found that non-democratic nations with poor human rights ratings were just as likely, and sometimes even more likely, to commit to international human rights treaties than non-democratic nations with better human rights ratings.

⁴⁰ The results of empirical tests of this theory, however, have been mixed. For example, in their conference paper, Michael Struett and Steven Weldon found that states that spent more of their national income on defense and those that had a greater share of world military spending (when controlling for democracy) were less likely to ratify the treaty creating the ICC. Michael J. Struett and Steven A. Weldon, "Why Do States Join the International Criminal Court: A Typology," presented at the International Studies Association Annual Meeting, Chicago, Illinois (2007). On the other hand, Judith Kelley found that a state's relative military power (measured as military spending in millions of dollars) did not predict a state's affinity for the ICC – nor its likelihood of later signing a bilateral immunity agreement with the United States. Kelley, "Who Keeps International Commitments and Why?", 580.

⁴¹ Downs, Locke, and Barsoom, "Is the Good News about Compliance Good News about Cooperation?" 388-92; Hathaway, "The Cost of Commitment," 1834-36.

She attributed this finding to the absence of both external and internal enforcement mechanisms. Specifically, not only did the treaties themselves lack significant enforcement mechanisms, but autocratic nations also lacked internal enforcement mechanisms in the form of an active and vocal civil society or others who ordinarily push for better practices in democracies.⁴² In another study, Hathaway found that approximately the same percentage of countries with the most recorded acts of torture ratified the Convention Against Torture as did countries with no recorded acts of torture.⁴³ Emilie M. Hafner-Burton & Kiyoteru Tsutsui have reported that the average state has ratified a steadily increasing number of human rights treaties, but that the percentage of states apparently repressing human rights has grown over time, suggesting that states may ratify only as window dressing without any intention of actually improving their practices.⁴⁴

Domestic Ratification Costs

In addition to compliance costs, another cost that may influence a state's ratification behavior, and which may require states to examine their past and present practices, is the cost of a state's domestic ratification processes. Beth Simmons identifies the domestic ratification process as a primary cost that governments face when deciding whether or not to commit to international treaties.⁴⁵ For a state to bind itself to an international human rights treaty, it must follow whatever domestic processes are required to make any ratification legal and legitimate. As Simmons notes, governments face the fewest political costs to treaty ratification when they fully control the process: for example, where the head of state has the sole right to make ratification decisions. However, many states are subject to a much more onerous process: states may require parliamentary debate or majority or supermajority votes by legislative bodies before

⁴² Hathaway, "The Cost of Commitment," 1856-57.

⁴³ Hathaway, "Do Human Rights Treaties Make a Difference?," 1982-87.

⁴⁴ Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World," 1374.

⁴⁵ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009), 68.

the government is permitted to bind itself to an international treaty. With the presence of a greater number of domestic legislative veto players, governments may face opposition to, or delays in, the treaty ratification process that can make commitment to an international human rights treaty too politically costly for a government to pursue.⁴⁶

Prospective Calculations

Uncertainty Costs

According to some theories, states will also have reason to look into the future to determine the likely consequences and costs associated with ratifying a particular treaty. For example, some states may face unique uncertainty costs that will cause them to avoid ratifying, or move slowly in ratifying, international human rights treaties. In particular, states that follow a common law tradition may find commitment to international legal tribunals more costly than will states following a civil law tradition.⁴⁷ Generally speaking, the treaties to which a state commits also become part of that state's law. In the common law tradition, however, the judiciary is generally independent from the government and there is some possibility that it will apply treaty law in a way that creates new government obligations to the state's citizens and others.⁴⁸ This uncertainty in how treaty law will be applied in the future after ratification may cause common law states to be wary of ratifying international human rights treaties – even where they agree with its principles and have policies in place that enable compliance with treaty terms.

Credible Commitment

Even where the costs of complying with treaty terms are significant, Beth Simmons and

⁴⁶Simmons, *Mobilizing for Human Rights*.

⁴⁷Simmons, *Mobilizing for Human Rights*, 71; Jay Goodliffe and Darren G. Hawkins, "Explaining Commitment: States and the Convention against Torture," *The Journal of Politics* 68 (2006): 364.

⁴⁸ Simmons, *Mobilizing for Human Rights*, 71-74.

Allison Danner suggest that some states rationally calculating the costs of treaty commitment will conclude that those costs are outweighed by the future domestic benefits states can obtain by credibly committing to a treaty with strong enforcement mechanisms. Specifically, Simmons and Danner suggest that in the case of the ICC, non-democracies with poor human rights practices will join the court precisely because it has strong enforcement mechanisms that will allow them to signal a credible commitment to their domestic audience to end the cycle of violence and, instead, in the future, respond non-violently to crises. These scholars argue that where the potential gains from making a credible commitment are high, the sovereignty costs of joining the court are overridden, and the state will be rational in deciding to tie its hands and commit to acting differently in the future.⁴⁹ In short, Simmons and Danner argue that non-democratic states with poor human rights practices and a history of violence have incentives to calculate the costs of ratifying the ICC by looking ahead – rather than backwards. And, the results of event history analysis provide evidence supporting their theory. Simmons and Danner find that states that have experienced mass atrocities and that have poor practices (measured by whether the state had experienced a civil war with more than 25 deaths between the period 1990 and 1998) are likely to join the ICC as long as those states also have weak institutions of domestic accountability (measured by, among other things, democracy and rule of law ratings).⁵⁰ States with poor practices, but strong institutions of domestic accountability, however, are less likely to join the ICC, a result which Simmons and Danner attribute to the fact that such states already had domestic institutions – such as a civil society and courts that followed the rule of law – which could ensure leaders would be held accountable for any future acts of violence.⁵¹

Simmons and Danner are likely correct that some states make prospective calculations

⁴⁹ Simmons and Danner, “Credible Commitments and the International Criminal Court,” 233-36.

⁵⁰ Measures for these two main explanatory variables are discussed at page 238.

⁵¹ Ibid. at 240.

and join the ICC notwithstanding their past and present inability to comply with treaty terms so as to commit to better their practices in the future, but I am not convinced that non-democratic states with poor human rights practices would overwhelmingly calculate their ICC commitment decisions in the way these scholars suggest. Rather, I am more persuaded by the underlying logic of Oona Hathaway's argument which suggests that states are more retrospective in their treaty ratification calculations inasmuch as they look to their past human rights practices and will generally refuse to commit to treaties with which they cannot comply unless enforcement mechanisms are weak. Indeed, Hathaway argues that the reason autocratic states with poor practices commit to human rights treaties with weak enforcement mechanisms is because of the absence of both external and internal enforcement mechanisms.⁵² Thus, according to Hathaway's reasoning, autocratic states with poor practices are not committing to international human rights treaties because they want to credibly commit and tie their hands so that they cannot act violently in the future. Instead, those autocratic states with poor practices commit to international human rights treaties because commitment will not tie their hands, thus enabling them to continue to disrespect human rights and repress their domestic audience without facing consequences for doing so. And, it makes sense that an autocratic regime which has declined to place domestic constraints on its power to do and act as it pleases may not want to place international constraints on that same power by committing to an international human rights treaty like the ICC which has relatively strong enforcement mechanisms. Therefore, and as Hathaway found, I expect that non-democracies with poor practices will typically be more retrospective in rationally calculating the costs associated with joining an international human rights treaty and be wary of joining treaties other than those with weak enforcement mechanisms that cannot be used to punish noncompliant behavior.

⁵² Hathaway, "The Costs of Commitment," 1856-57.

In any event, even aside from the logic of Simmons' and Danner's theory, I am not convinced that their "recent civil wars" variable captures the concepts it was designed to measure: namely, a state's level of human rights practices or its likelihood of committing mass atrocities.⁵³ First, 25 battle deaths in a year does not necessarily capture "violent states" or states at risk of committing mass atrocities since 25 battle deaths is not an enormous number and does not account for whether the deaths were the result of "criminal" action or poor practices on the part of the government or any rebel group. In addition, 25 battle deaths are not even sufficient to constitute a civil war as most scholars understand it. The Correlates of War dataset which is widely used classifies civil wars as those having over 1000 war-related casualties per year of conflict. If "recent civil wars" does not capture the concept of a state with poor human rights practices or a tendency towards committing mass atrocities, there may be reason to question Simmons' and Danner's empirical results showing that autocratic states with these qualities were more likely to commit to the ICC so as to tie their hands against acting violently in the future.

Finally, even accepting that "recent civil wars" is an adequate measure for the concepts tested, an examination of Simmons' and Danner's Appendix of states that had experienced such "recent civil wars" provides evidence contrary to their theory. It shows that the autocratic states among those with recent civil wars were *not* more likely than the democratic states to commit to the ICC. Of the 22 democratic states listed, 9 had joined the court, while 13 had not.⁵⁴ Of the non-democratic states listed, 9 had joined the court, but some 16 had not.⁵⁵ Thus, even putting

⁵³ Simmons and Danner state that the "recent civil wars" measure is designed to capture states "at risk for committing mass atrocities." Ibid. at 237.

⁵⁴ Appendix A shows that of the democratic states with "recent civil wars," Colombia, Djibouti, Georgia, Mali, Mexico, Niger, Senegal, Sierra Leone, and Spain joined the court. The Appendix A referenced in the Simmons and Danner article published in International Organizations is not on their referenced website. See <http://scholar.harvard.edu/bsimmons/publications/credible-commitments>. Accordingly, I used the Appendix A in their February 2008 draft.

⁵⁵ Appendix A shows that of the non-democratic states with "recent civil wars," Afghanistan, Bosnia, Burundi, Cambodia, Democratic Republic of Congo, Liberia, Peru, Tajikistan, and Uganda joined the court.

aside questions about measurement error, it seems that a smaller percentage of the non-democratic states had joined the court – yet these non-democratic states with “recent civil wars” are the very states that Simmons and Danner argue will join the court to demonstrate their credible commitment to end the cycle of violence. Accordingly, for this reason, and the reasons outlined above, I suggest that the logic behind Oona Hathaway’s argument is more sound, and that we should expect autocratic states with poor human rights practices will commit to international human rights treaties with weak enforcement mechanisms, but be wary of committing to international human rights treaties that would impose external constraints on their ability to do as they please.

Democratic Lock-In

Finally, and along these same lines, Andrew Moravcsik also suggests that some states will have reasons to be forward-looking in rationally calculating the costs and benefits associated with ratifying a particular treaty. Specifically, Moravcsik argues that new, transitioning democracies can outweigh the sovereignty costs associated with joining international human rights treaties by locking in the treaty’s democratic principles and thereby constraining the activities of future governments that may seek to subvert democracy.⁵⁶ In testing this theory, Moravcsik found evidence that dictatorships and established democracies voted against binding human rights guarantees during negotiations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “ECHR”), whereas the newly-created democracies supported binding guarantees.⁵⁷ Similarly, Edward Mansfield and Jon Pevehouse have concluded that newly democratizing nations are especially likely to enter international

⁵⁶ Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54 (2000): 225-30.

⁵⁷ Moravcsik, “The Origins of Human Rights Regimes,” 232.

organizations because doing so would allow the state to “credibly commit to carry out democratic reforms and . . . reduce the prospect of reversions to authoritarianism.”⁵⁸

Accordingly, some newly democratic countries may conclude that the costs of complying with international human rights treaties are relatively low since they would have adopted – or at least intend to adopt – policies that are consistent with treaty terms. Furthermore, the benefits that new democracies may realize by locking future governments into following their liberal policies may outweigh the risk that the state may not be able to immediately and fully comply with treaty terms. However, when Moravcsik’s theory was tested in connection with state decisions to support the Convention Against Torture, it found little support.⁵⁹

The Normative View

Under the normative view, states will join international human rights treaties even if it may not appear to be in their rational self-interest to do so – for example, because at the precise moment in time, compliance with treaty terms may be difficult. According to normative theories, states act based on the “logic of appropriateness” and indicate their commitment to particular international norms because they are led to believe that behavior consistent with those norms is appropriate and necessary for states wishing to be viewed as legitimate.⁶⁰ Martha Finnemore and Kathryn Sikkink argue that after new norms are adopted by a significant number of states, a “norm cascade” will follow, such that other states will feel pressured to commit to the norm as well.⁶¹ Norms are spread by, and states are subjected to normative pressures from,

⁵⁸ Edward D. Mansfield and Jon C. Pevehouse, “Democratization and International Organizations,” *International Organization* 60 (2006): 138.

⁵⁹ Goodliffe and Hawkins, “Explaining Commitment: States and the Convention Against Torture,” 365.

⁶⁰ Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996): 5-6.

⁶¹ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52 (1998): 900-04.

powerful democracies, transnational governance regimes like the United Nations, and global civil society.⁶²

In this regard, and as many scholars have noted, states may initially succumb to normative pressures because they receive rewards as a result: for example, investment, aid, and trade.⁶³ Although they would prefer to guard their sovereignty and avoid external constraints, states may join international human rights treaties in the hopes that ratification will make them appear more legitimate, and thus, more suitable recipients of investment. Weaker or poorer states may commit to international human rights treaties because they are indirectly or directly pressured to do so by the greater powers on which they rely for aid or trade.⁶⁴ It makes sense that states would believe more powerful and wealthier states want them to embrace favorable human rights norms in order to receive certain benefits from them. As Emilie M. Hafner-Burton points out, many preferential trade agreements not only govern market access, but they tie that access to a state's ability to comply with various human rights standards.⁶⁵

States may also be pressured directly or indirectly to embrace the norms and policies that their neighbors embrace. If many states in a region are committing to a particular treaty, other states may feel pressured to similarly commit. A state's ratification of international human rights treaties can signal to others in the region that it is a legitimate member of that region. In addition, states may be led to understand that with their legitimacy established, they will be

⁶² Wotipka and Tsutsui, "Global Human Rights and State Sovereignty," 736.

⁶³ Goodliffe and Hawkins, "Explaining Commitment: States and the Convention Against Torture," 361 (citing Frank Schimmelfennig, "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union," *International Organization* 55 (2001) and Beth A. Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs," *American Political Science Review* 94 (2000)).

⁶⁴ Simmons, *Mobilizing for Human Rights*, 77; Wotipka and Tsutsui, "Global Human Rights and State Sovereignty," 734-35.

⁶⁵ Emilie M. Hafner-Burton, "Trading Human Rights: How Preferential Trade Agreements Influence Government Repression," *International Organization* 59 (2005): 594.

eligible for other rewards – for example, participation in regional trade arrangements.⁶⁶

In addition to the pressure from their neighbors to signal appreciation of certain norms, where the ICC is concerned, states may have been subjected to normative pressure to join the ICC by pro-ICC NGOs. In his study of state decisions to join the ICC, Michael Struett found anecdotal evidence suggesting that NGOs played a large role in convincing states that joining the ICC was necessary to be considered a legitimate state: one that would promote the appropriate norm of supporting an international court to help end impunity for crimes against humanity.⁶⁷

Synthesis and Analysis: Literature Addressing State Decisions to Join the ICC

As mentioned above, although scholars have generally examined state commitment to international human rights treaties, there is little scholarly literature empirically addressing the precise question of why states commit to the ICC. Research has revealed only four works that propose and empirically test general theories about the issue. Furthermore, those works posit different theories about commitment decisions; they employ different dependent variables in different empirical models; and they reach different conclusions about what variables are and are not driving ICC commitment decisions. Indeed, the findings from these studies differ significantly on the variables I argue should be most relevant to state decisions to commit to the ICC: (1) a state's level of human rights practices and (2) the independence and capability of its domestic law enforcement institutions (which, as described below, I measure primarily by using a rule of law indicator). Table 1 compares these works in terms of the methods used, their dependent variables, and their main findings.

⁶⁶ Goodliffe and Hawkins, "Explaining Commitment: States and the Convention Against Torture," 361.

⁶⁷ Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York: Palgrave MacMillan, 2008).

Table 1: Comparison of Empirical Works Testing Commitment to the ICC

Work	Theory	Model	Dependent Variable	Main Finding	Conclusion Re Human Rights	Conclusion Re Rule of Law
Kelley (2007)	Concerns state decisions about signing bilateral immunity agreements	Logit for preliminary analysis of ICC ratification	ICC ratification; signature on bilateral agreement	States with most affinity for the ICC and high rule of law states that ratified are least likely to sign bilateral agreements	States with better human rights practices are more likely to ratify	Higher rule of law states are no more likely to ratify
Struett and Weldon (2007); Struett (2008) ⁶⁸	Normative: NGOs influenced ICC ratification	Logit	ICC ratification	NGO influence not significant (likely because of measurement difficulty)	No measure	No measure
Goodliffe and Hawkins (2009)	Normative: Dependence networks determine state support for a strong ICC	3 Models: 2 Fixed Effects; 1 Random Coefficients	Support for a strong ICC (evidenced by statements made during ICC negotiations)	A state's trade dependence networks are a primary determinant of state support for a strong ICC	Higher human rights practices led to support for a strong ICC in 1 of 3 models	No measure
Simmons and Danner (2010)	Rationalist and Prospective: Non-democracies with recent civil war join ICC to signal credible commitment	Event History	Treaty ratification and signing	Non-democracies with recent civil wars are most likely to commit to the ICC	No measure (or used civil war as measure)	Measured in robustness check for democracy as accountability measure; weakest rule of law states more likely to commit to ICC

As Table 1 shows, there is anything but a clear consensus as to what influences state decisions to commit or refuse to commit to the ICC, indicating that further study of the issue is necessary. The present study is unique in that rather than offering and testing rather obscure theories about ICC commitment decisions, it focuses on the precise terms of the treaty and asks whether states consider those terms, and the costs associated with failing to comply with them,

⁶⁸ Michael Struett made this argument about NGO influence in his 2008 book. In an earlier conference paper, Struett and Weldon made this argument in the context of a larger empirical model testing state decisions to ratify the ICC. Struett and Weldon, "Why do States Join the International Criminal Court: A Typology."

when making decisions about whether to join the court. In other words, while it may be interesting to test theories about whether states are motivated to join international regimes because they are persuaded by their trade partners or NGO representatives to do so, the fact remains that by ratifying a particular treaty like the Rome Statute, states are presumably binding themselves to its precise terms. And for states behaving rationally and according to the logic of consequences, treaty terms should be the best and first guide as to whether treaty ratification makes sense from a cost/benefit standpoint. Furthermore, because noncompliance with the ICC's enforcement mechanisms could result in a significant sovereignty loss, doing what is appropriate is more likely something states will consider after they determine they can comply with the treaty.⁶⁹ In short, in the case of ICC commitment, states should be more likely to focus first on the costs of compliance, rather than any uncertain, intangible, or indirect benefits that they might hope to derive from appearing to be a legitimate state that embraces international human rights norms.

⁶⁹ Of course, one might ask what benefits a state with good human rights practices and good law enforcement institutions might obtain from joining an international organization that exists only to promote better human rights practices and domestic institutions. My theory, however, posits that where a treaty contains significant enforcement mechanisms like this one, a state will be primarily concerned with the costs of having to comply with the treaty, since it is noncompliance that can subject the state to the ICC's relatively strong enforcement mechanism and a loss of sovereignty. In the case of the ICC, if the state's cost calculation leads it to conclude that it is highly unlikely to violate the treaty's terms, I expect that state to join the ICC – because the costs of commitment are minimal. Nevertheless, and although my theory envisions a rational state most concerned with *costs* when making decisions about commitment to regimes like the ICC, I can imagine several benefits those same states might believe they would obtain from joining the ICC (all of which are likely extremely difficult, if not impossible, to quantify). For example, states with better human rights practices likely believe the norm of protecting human rights is worth spreading to the rest of the world. Thus, there may be some moral benefit to supporting an organization with a mission to improve global human rights practices. Furthermore, a state with good practices may conclude that an organization like the ICC has the potential via its enforcement mechanism to deter future mass atrocities – atrocities which presumably can produce negative consequences beyond the state in which they are occurring – by, for example, disrupting trade patterns and inhibiting production of goods or the extraction of resources. In addition, where mass atrocities occur, other states are often called upon to provide peacekeeping forces or foreign aid, goods, services, and housing to the innocent victims of such atrocities. To the extent such atrocities are deterred by the ICC, all of these negative consequences can be mitigated, thereby creating a potential benefit to the states that otherwise “pay” in some sense for those consequences. In any event, a state may conclude that as with the ad hoc tribunals set up by the United Nations, there is some deterrence value – and no harm to itself in the sovereignty sense – in having in place an organization that can prosecute *the citizens of other states* for mass atrocities – particularly one that might be able to deter those atrocities before they even occur.

Treaty terms should particularly guide state decisions to commit to the ICC given that its institutional design is unique amongst other international human rights treaties. Only the ICC treaty provides for an independent prosecutor and court with the ability to require states to surrender their own nationals for prosecution by an international criminal court if those states fail to comply with treaty terms. The uniqueness of this enforcement mechanism alone should cause states to scrutinize it and its implications for their behavior – especially when it is contrasted with the usually weak enforcement mechanisms that accompany international human rights treaties. Moreover, since the ICC’s enforcement mechanism is unique, states are not able to look to other similar treaties or the actions of treaty bodies that oversee compliance with other similar treaties to help them interpret the actual strength and meaning of a treaty’s enforcement mechanisms – and accordingly, the likelihood that they will be held accountable for failing to comply with treaty terms. And, while states that wait to ratify the ICC treaty may be able to look at the actions of the ICC prosecutor and court to help them determine whether the treaty’s enforcement mechanisms are actually as strong as they appear to be on paper, states that ratified promptly had only the treaty text on which to rely in making their commitment decisions.

Furthermore, as noted above, I disagree with Simmons and Danner who suggest that autocratic states with poor practices should commit to the ICC precisely because its strong enforcement mechanisms (per treaty terms) enable those states to demonstrate their credible commitment to respond non-violently to any future crises. On the contrary, I argue that rather than calculating the costs of treaty commitment prospectively, autocratic states with poor practices are those that should most logically look retrospectively to calculate their costs of committing to the ICC. States that have experienced significant episodes of violence in the past and that have a history of poor human rights practices have reason to believe that based on that

history, compliance with a treaty promoting good human rights practices may be difficult. Because compliance may be difficult, autocratic states with such a history of violence and poor practices should be very wary of committing to the ICC – a treaty with relatively strong enforcement mechanisms that can operate to punish those states for their noncompliance. Autocratic states generally have not implemented domestic machinery, such as independent courts that follow the rule of law or other checks and balances on their power, to hold them accountable to responding non-violently to any future crises. It accordingly makes little sense to conclude that such states would want to commit to an international institution that could hold them accountable – especially, where, as here, the consequences of failing to respond non-violently could result in government actors being arrested and brought to stand trial in The Hague. For these states, commitment would necessarily entail a costly loss of sovereignty and reduce their power to rule and punish as they see fit.

In sum, states should view the ICC's relatively strong enforcement mechanisms as a credible threat and should act accordingly. Even though prior studies have shown that states often ratify human rights treaties without regard to their ability to comply, in making decisions about ICC commitment, states should be concerned with their ability to comply with treaty terms. Testing the potential for compliance with ICC treaty terms necessarily requires that any model include measures relating to the ability to comply: in this case, variables measuring a state's level of human rights practices and the independence and capability of its domestic legal institutions.

Strong Enforcement Mechanisms as a Credible Threat

Although, as is evident from the above discussion, there may be many reasons why states are motivated to commit to, or refuse to commit to, international human rights treaties, my focus

is on compliance costs and the potential threat posed by strong enforcement mechanisms. When I refer to enforcement mechanisms in this context,⁷⁰ I refer to the formal grant of power from states to some entity or institution with authority to oversee state compliance with treaty terms.

The weakest enforcement mechanisms are characterized by “soft law” provisions – using the language of Kenneth Abbott and Duncan Snidal.⁷¹ “Soft law” exists where legal arrangements are weakened by lacking clear obligations, precision, or a clear delegation of authority or responsibility.⁷² Stronger, “hard law” enforcement mechanisms are precise and binding: for example, a formal grant of power to a committee or court to engage in authoritative, institutionalized, and legally binding decision making.⁷³ As Darren Hawkins notes, to constitute strong enforcement, there must be authorized decision makers who are “officially empowered by states to interpret and apply the rule of law and who control resources that can be used to prevent abuses or to punish offenders.”⁷⁴ States should view strong enforcement mechanisms as a credible threat because they are costly: they impose precise and binding restrictions on the state’s sovereign right to control matters of domestic governance.

As a rule, international human rights treaties are characterized by “soft law” enforcement mechanisms⁷⁵ because they are lacking clear obligations, precision, or delegation of authority or responsibility.⁷⁶ Traditional human rights treaties typically delegate only the power to monitor

⁷⁰ I draw on several scholarly works for this discussion about enforcement and legalization. See Darren Hawkins, “Explaining Costly Institutions: Persuasion and Enforceable Human Rights Norms,” *International Studies Quarterly* 48 (2004): 781; Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “Legalization and World Politics: An Introduction,” *International Organization* 54 (2000): 385; Abbott and Snidal, “Hard and Soft Law in International Governance,” *International Organization* 54 (2000): 437; and Jack Donnelly, “International Human Rights: A Regime Analysis,” *International Organization* 40 (1986): 603-05.

⁷¹ Abbott and Snidal, “Hard and Soft Law in International Governance,” 422-24.

⁷² *Ibid.*

⁷³ *Ibid.* at 421.

⁷⁴ Hawkins, “Explaining Costly Institutions,” 781.

⁷⁵ Abbott and Snidal, “Hard and Soft Law in International Governance,” 422-24.

⁷⁶ This absence of enforcement mechanisms in international human rights treaties is a fact Oona Hathaway emphasized when explaining her results which showed that non-democracies with poor human rights ratings were just as likely as non-democracies with good human rights ratings to commit to such treaties. She notes that non-

state behavior, as opposed to the power to enforce state compliance with treaty standards. For example, most human rights treaties require only that the state submit regular reports to a committee about its efforts to comply with treaty terms. Furthermore, as Jack Donnelly notes, “whatever the quality of the report, once it has been reviewed, the monitoring process typically ends until the next report is due in five years.”⁷⁷ Additional articles and the optional protocols to these treaties have somewhat more significant enforcement mechanisms in that states can recognize the competence of a committee to receive and review state or individual complaints alleging that a state party has not fulfilled its treaty obligations and has either failed to protect or abused human rights.

None of these enforcement mechanisms, however, is particularly strong since none involves state delegation of power to another entity to make legally binding decisions.⁷⁸ Simply put, in no case are the committees given the power to issue legally-binding decisions: rather, while they can issue decisions, by the very terms of the treaty, committee decisions are in the nature of recommendations only. It is true that by binding themselves to treaty terms, states may feel some moral obligation to abide by committee recommendations and suggestions regarding how to resolve individual or state complaints. However, states have not delegated power to the committee to make legally binding decisions, nor have they provided the committees with any

democracies have few or no internal enforcement mechanisms – such as domestic civil society – which might be used to pressure non-democracies to honor their commitments. Therefore, in the absence of external enforcement mechanisms associated with the treaty, non-democracies could conclude that commitment was essentially costless – and perhaps even beneficial, as it would enable them to appear legitimate. Hathaway, “The Cost of Commitment,” 1856.

⁷⁷ Jack Donnelly, *International Human Rights* (3d ed.) (Boulder: Westview Press, 2007), 85. Donnelly further explains that while reporting procedures are useful in that they provide a concrete reminder for states to review their practices, those procedures cannot be used to force recalcitrant states into actually improving their practices. 87.

⁷⁸ See, for example, Achene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* (Springer, 1999), 63 (discussing the Committee Against Torture); Henry J. Steiner, “Individual Claims In A World Of Massive Violations: What Role For The Human Rights Committee,” in *The Future of UN Human Rights Monitoring*, eds. Philip Alston and James Crawford (Cambridge: Cambridge University Press, 2000), 37 (noting that the Human Rights Committee has no authority to act punitively against any state offending the ICCPR or to impose sanctions against it).

resources or powers to punish those who do not comply with their recommendations.

This does not mean the enforcement mechanisms associated with traditional human rights treaties are not helpful or meaningful steps in inducing state compliance or improving human rights. The reports, decisions, and comments by the committees on state noncompliance can be used by NGOs or individuals in an effort to shame the state into compliance. Other states may also use the evidence contained in those reports as ammunition to force a state into compliance: for example, states may withhold aid or trade until a state agrees to improve its human rights record. Even if a state fails to cooperate with its obligations or follow committee recommendations, the committee's decisions and reports may be valuable in persuading the state to comply. However, regarding the level of the enforcement mechanisms to which states bind themselves pursuant to the treaty's terms, the fact is that the committees do not have legally-binding adjudicatory power coupled with resources to compel compliance with their comments, views, and recommendations. Moreover, even had the state not joined the particular treaty, NGOs, states, or civil society probably could find equivalent evidence about the state's poor human rights practices to shame it into improving those practices.

As compared to traditional human rights treaties, I suggest that only the ICC is governed by "hard law" enforcement mechanisms. The ICC treaty describes in detail the elements of the covered crimes of genocide, crimes against humanity, and war crimes.⁷⁹ By the terms of the treaty, states have also designated to an independent entity the authority to determine that there is evidence to believe an individual or group committed one of the covered crimes within the territory of a State Party.⁸⁰ In addition, they have delegated the power to determine whether the state which would otherwise have jurisdiction over the matter is itself either unwilling or unable

⁷⁹ Rome Statute, Arts. 5-8.

⁸⁰ Rome Statute, Arts. 1-4 (describing the establishment of, and powers, of the court) and Art. 15 (describing the powers of the ICC prosecutor).

to prosecute the wrongdoers.⁸¹ Furthermore, the ICC has resources to compel compliance with its determinations: it may issue arrest warrants to bring persons or groups to the ICC in The Hague to stand trial for their alleged crimes; it may try alleged offenders; and it may sentence those found guilty to prison terms.

Of course, the ICC cannot effectuate arrests without the assistance of States Parties since the institution itself has no international police force. In addition, even though States Parties commit to cooperate in arresting those individuals for whom arrest warrants are issued, the ICC has no police force to make states comply. Thus, while some states have cooperated in bringing suspects to The Hague for trial,⁸² at least a couple of African nations have refused to arrest President Omar Al-Bashir of Sudan for whom an arrest warrant was recently issued.⁸³

Nevertheless, the power delegated to the ICC is still of a legally binding nature. While a suspect may be able to escape arrest by staying in state or hiding (and suspects can always escape arrest in similar ways even under domestic criminal law systems where police forces can effectuate arrests), those subject to an arrest warrant are not completely free to do as they please. The warrant is a legal document backed by the power of the law, and the subject can be arrested by any state willing to make the arrest. Even President Bashir likely feels the threat of the warrant for his arrest: while he has traveled to some friendly countries in Africa, he probably will not risk a trip to Europe. Indeed, the power of the fact of potential arrest warrants was recently demonstrated when in June 2010, Darfur suspects appeared in The Hague “voluntarily”

⁸¹ Rome Statute, Art. 17.

⁸² The former Vice-President of the Democratic Republic of the Congo – who was the subject of a sealed arrest warrant – was arrested during a visit to Belgium. “Congo Ex-Official Is Held In Belgium on War Crimes Charges,” Agence France-Press, May 25, 2008.

⁸³ Both Chad and Kenya are ICC States Parties who have recently hosted President Bashir in their countries notwithstanding the warrant for his arrest. According to a September 21, 2010 ICC Press Release, Kenya’s Minister of Foreign Affairs acknowledged Kenya’s obligation to cooperate with the ICC, but also highlighted its competing obligations to the African Union and regional stability and peace in explaining Kenya’s refusal to arrest President Bashir while he was in the country. ICC Press Release, “President of the Assembly meets Minister of Foreign Affairs of Kenya,” Sept. 21, 2010.

in order to avoid having warrants issued for their arrest.⁸⁴

Accordingly, because the ICC treaty has relatively strong enforcement mechanisms that are legally-binding in nature, I expect state ratification behavior will be influenced by states' retrospective calculations about their ability to comply with treaty terms. Principally, compliance requires a state and its nationals to commit to having relatively good human rights practices. Where nationals of State Parties do not commit any of the covered crimes, there will be no opportunity for the ICC to even potentially obtain jurisdiction over a matter. Therefore, a sufficient condition for ICC ratification is good human rights practices, since states with good practices can conclude that ratification will not lead to a costly loss of sovereignty.

Secondarily, compliance also may require a state to have relatively independent and capable domestic law enforcement institutions to prosecute human rights violations – in the event that the state's government and/or citizens do commit the kinds of mass atrocities that would otherwise be within the ICC's jurisdictional purview. Independent judicial institutions that follow the rule of law should be able to punish even governments that would otherwise be “unwilling” to punish themselves or their compatriots who commit human rights violations. Capable domestic law enforcement institutions with resources and sufficient expertise should be “able” to conduct the kind of investigations and prosecutions that will ensure that perpetrators of mass atrocities are punished for their conduct. Of course, because states with good human rights practices should not expect to commit the kinds of atrocities covered by the ICC treaty, they can still conclude that ICC commitment is relatively costless even if their domestic law enforcement institutions are not independent or capable.

For states with bad human rights practices, however, the cost of compliance calculations

⁸⁴ ICC Press Release, “As Darfur rebel commanders surrender to the Court, ICC Prosecutor ‘welcomes compliance with the Court’s decisions and with Resolution 1593 (2005) of the Security Council,’” June 16, 2010 (addressing the arrival of two Darfur rebel commanders to answer charges and face prosecution for their conduct).

will be less straightforward. For these states, because their government or citizens may commit the kinds of crimes covered by the ICC treaty, complying with treaty terms necessarily rests on whether they are able to take advantage of the treaty's complementarity provision. But, as an initial matter, relying solely on the availability of the treaty's complementarity provision for compliance is risky because pursuant to treaty terms, the ICC prosecutor and court are authorized to determine whether any domestic prosecutions are adequate to ward off an ICC investigation. In addition, however, the data shows that there are relatively few states with poor practices that are also likely to have independent and capable domestic law enforcement institutions (based on either their rule of law scores or their democracy ratings). Therefore, it may be that in most cases, states with poorer human rights practices are also states where power is concentrated such that the government is able to abuse human rights and also controls the state machinery to such an extent that the judiciary is not independent and the rule of law is not fairly applied. In other words, not only may governments with poor practices risk having the ICC conclude that their domestic prosecutions are inadequate, but also they may be complicit in committing any human rights abuses and, therefore, be "unwilling" to ensure that such abuses are punished. As such, although independent and capable law enforcement institutions should be a sufficient condition for states to conclude that ratification of the ICC treaty is relatively costly, I expect that in most cases, states with poor human rights practices will either be wary of relying solely on this condition, or will be "unwilling" to do so.

In sum, I suggest that good human rights practices and independent and capable domestic law enforcement institutions are each individually sufficient conditions for states to rationally commit to the ICC treaty and its relatively strong enforcement mechanisms. If a state has either good human rights practices or independent and capable domestic law enforcement institutions,

it should conclude that ratifying the ICC treaty does not pose a significant risk to its sovereignty, and the state should commit to the court. In addition, for a state to conclude that ICC ratification is essentially costless because the state can comply with treaty terms, either good human rights practices or independent and capable domestic law enforcement institutions are a necessary condition to ratification. However, because the ICC has the ability to determine whether the state's domestic investigations and prosecutions are adequate to ward off ICC jurisdiction, better human rights practices are almost a necessary condition to ratification.

The table below shows the commitment decisions I expect states to make based the theory outlined above.

Table 2: State Commitment Decisions Expectations

	Low Likelihood of Human Rights Violation	High Likelihood of Human Rights Violation
Worse Domestic Law Enforcement Institutions	Commit to ICC (since not likely to violate treaty terms)	Least likely to commit to the ICC
Better Domestic Law Enforcement Institutions	Most likely to commit to the ICC	Refuse to commit to the ICC (since can't control ICC determinations about the quality of domestic prosecutions) [but also theoretically unlikely many states in this category]

CHAPTER THREE

TESTING STATE COMMITMENT TO THE INTERNATIONAL CRIMINAL COURT

Methodology

I use event history analysis – specifically a Cox proportional-hazards regression model⁸⁵ - to analyze the extent to which both constant and time-varying factors influence the probability that a state will ratify⁸⁶ the ICC treaty in a given time period. Because we do know the dates that countries have ratified the ICC treaty, I arrange the data quarterly to include that variation in the model. The results will be reported as hazard ratios, which will indicate the proportionate influence a given factor has on a state's decision to commit to the ICC. Numbers greater than one indicate an increase in the hazard rate of ratification. Numbers less than one indicate a decrease in the hazard rate.

Dependent Variable

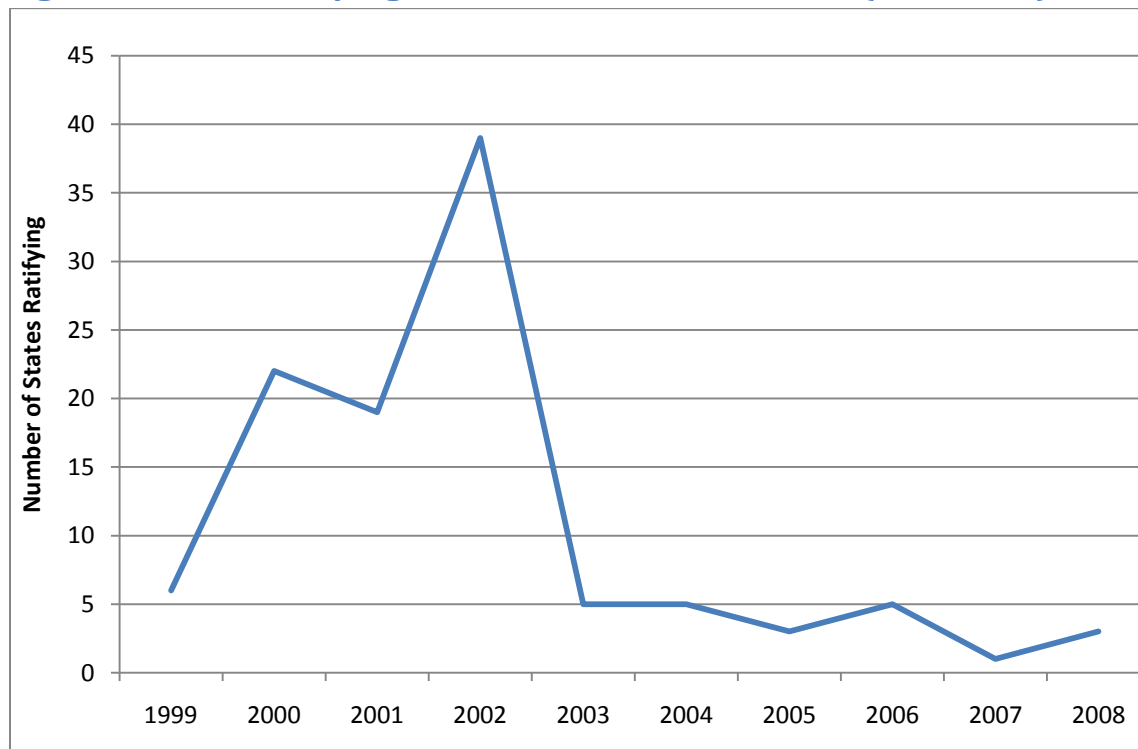
Ratification data regarding the ICC treaty were coded from information collected by the ICC. The data is assembled at quarterly intervals for more than 190 countries between 1998 and 2008. Countries existing in July 1998 when the ICC treaty was adopted and available for ratification are “at risk” of ratifying at that time. Countries established after that time enter the risk set upon independence – the time when they are eligible to ratify as a sovereign state. Countries at risk are given a value of 0 until they ratify. At the time of ratification, countries are assigned a value of 1. Countries that did not ratify by the end of 2008, when the observation period here ends, are right-censored. By the end of 2008, some 108 states were States Parties to

⁸⁵ For a comprehensive description of event history analysis, see Paul D. Allison, *Event History Analysis: Regression for Longitudinal Event Data* (Sage, 1984); Hans-Peter Blossfeld, Katrin Golsch, and Gotz Rohwer, *Event History Analysis with Stata* (2007).

⁸⁶ I use the term “ratify” to refer to state decisions to commit to the ICC treaty by both ratification and accession since both methods equally commit the state to the court. In addition, most states committed to the ICC by ratification, which is the process used for commitment when the state has already previously signed the treaty.

the treaty. Appendix A contains a list of the 108 states that had ratified the ICC treaty by the end of 2008, together with their dates of ratification. Figure 1 shows the pattern of state ratification of the ICC treaty over time.

Figure 1: States Ratifying the Rome Statute over Time (as of 2008)



Independent Variables

The Main Explanatory Variables -- Level of Human Rights Practices and Level of Domestic Law Enforcement Institutions

I use two main measures of a state's human rights practices. First, the Cingranelli-Richards Human Rights Dataset measures a state's physical integrity based on data from U.S. State Department and Amnesty International reports.⁸⁷ It conceives of physical integrity as an aggregate of four component parts which it assesses in terms of frequency: tortures, extrajudicial killings, political imprisonments, and disappearances. Each of the component parts receives a

⁸⁷ David L. Cingranelli and David L. Richards, "The Cingranelli-Richards Human Rights Dataset Version 2008.03.12," available at <http://www.humanrightsdata.org>.

score of between 0 and 2, which scores are then aggregated to produce a final score of between 0 and 8 – with 8 representing the best human rights. The dataset covers 195 countries from between 1981 and 2008.⁸⁸

Second, genocide – a specific crime over which the ICC has jurisdiction – is measured using data on genocide and politicide.⁸⁹ From that data – which exists for the years from 1955 to 2006 – I create a dichotomous variable, putting states into a genocide category if they had a genocidal episode in that period and putting them in a non-genocidal category if they did not.⁹⁰

To capture whether the state possesses the independent, capable, and developed law enforcement institutions necessary to ensure that any violations of the crimes covered by the ICC treaty may be prosecuted domestically, I use a rule of law measure from the World Bank's Worldwide Governance Research Indicators project.⁹¹ This indicator measures "the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and

⁸⁸ I considered using the human rights measure from the Political Terror Scale 1976-2008 for this quantitative examination of state commitment to the ICC. Mark Gibney, L. Cornett, and R. Wood, "Political Terror Scale 1976-2008," available at <http://politicalterror scale.org>. That data is also based on human rights reports issued by Amnesty International and the U.S. Department of State. However, it covers fewer countries: 185 instead of 195. I thus chose to use the Cingranelli-Richards dataset for this study.

⁸⁹ Barbara Harff, "Annual Data on Cases of Genocide and Politicide, 1955-2006, compiled for the United States Government's State Failure Task Force," available at <http://globalpolicy.gmu.edu/genocide>.

⁹⁰ I chose not to include a measure of "recent civil wars" as did Simmons and Danner because, as noted above, I do not believe that measure accurately captures the concept of the level of a state's human rights practices or the likelihood that it will commit a mass atrocity. Simmons and Danner, "Credible Commitments and the International Criminal Court," 233-34, 237. First, I am not convinced that 25 battle deaths in a year are sufficient to constitute a civil war as most scholars understand it, particularly given that the Correlates of War dataset which is widely used classifies civil wars (intra-state wars) as those having over 1000 war-related casualties per year of conflict. Furthermore, I suggest that wars which produce so few yearly battle deaths would not accurately measure the concept the authors indicated they were capturing by that measure: namely, the states "at risk for committing mass atrocities." Ibid. at 237. In addition, the Simmons and Danner "recent civil wars" measure does not account for whether the deaths were the result of "criminal" action or poor practices on the part of the government or any rebel group. On the other hand, the Cingranelli-Richards data on human rights practices and the genocide data directly measure a state's tendency to commit the kinds of human rights violations that would subject the state's leaders and citizens to an ICC prosecution.

⁹¹ Governance Matters 2009, Worldwide Governance Indicators 1996-2008, available at <http://info.worldbank.org/governance/wgi/index.asp>. Although the data are available from 1996 to 2008, data were reported only biannually until 2002. Therefore, for the period between 1998 and 2002, I use the data from the immediate prior year to extrapolate missing data points.

violence.”⁹² I chose to measure the overall ability of the state to comply with the ICC treaty’s terms regarding the complementarity provision using the rule of law measure because I believe it is the best available measure that is focused precisely on the state’s domestic law enforcement institutions. It is true, as discussed below, that the democracy measure should capture some aspects relevant to the quality of the state’s domestic law enforcement institutions – such as the independence of the judiciary – because that measure deals in part with constraints on the chief executive. But, the rule of law measure is solely focused on domestic crime and violence and the quality of the domestic law enforcement institutions to combat those problems. Accordingly, the rule of law measure should capture the idea of independent courts, thereby addressing the complementarity provision’s “unwillingness” prong. It should also capture the idea of capable courts, thereby addressing the “inability” prong of the complementarity provision.

Control Variables: The Rationalist View

To test the idea that states with democratic governments are more likely than those with autocratic governments to ratify the ICC, I include a Polity IV democracy measure.⁹³ That democracy indicator is on a 0 to 10 scale, with scores based on several dimensions of democracy: (1) competitiveness of political participation; (2) openness and competitiveness of executive recruitment; and (3) constraints on the chief executive. This measure will specifically capture the democracy/non-democracy concept since that is precisely what the data addresses. But, as noted above, because state ratings also encompass information about the strength of the limits on government power to do as it wishes, this variable should include some information about the strength and independence of the country’s judiciary – although not as expressly as

⁹² Daniel Kaufmann, Aart Kray, and Massimo Mastruzzi, “Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006” (The World Bank 2007).

⁹³ Monty G. Marshall and Keith Jaggers, “Polity IV Project: Dataset Users’ Manual” (Polity IV Project 2007), available at <http://www.systemicpeace.org/inscr/inscr.htm>.

does the rule of law measure.

I use a state's gross domestic product ("GDP") per capita as a measure of economic development to test the hypothesis that more economically-developed states are more likely than less-developed countries to ratify international human rights treaties. GDP per capita is a standard control variable in cross-national research used as a proxy for a country's general level of economic development.⁹⁴

With respect to a state's level of military presence or exposure, I include a variable measuring the state's military spending. I use a measure of military spending as a percentage of GDP from the World Bank World Development Indicators which is available for all years in this study.⁹⁵ Although the human rights data should most directly measure whether the state's citizens are likely to commit the kinds of crimes covered by the ICC treaty, this military expenditure data is designed to capture the idea that states spending relatively more on their military are also more likely to have citizens engaged in military operations, thereby potentially exposing those citizens to ICC jurisdiction for acts committed during peacekeeping or warfare.⁹⁶

To measure the political costs associated with a state's domestic legislative treaty ratification process, I use data provided by Beth Simmons.⁹⁷ That data codes state ratification processes using a four-category scale, designed to capture the level of difficulty in the formal

⁹⁴ Simmons, *Mobilizing for Human Rights*, 385; Cole, "Sovereignty Relinquished?"; Wotipka and Tsutsui, "Global Human Rights and State Sovereignty." I obtain the measure from the World Bank World Development Indicators dataset, and I log the measure to reduce a skewed distribution. This measure indicates the level of a state's wealth and is correlated with its level of industrialization. This is a time varying measure that is reported in constant U.S. dollars. See <http://devdata.worldbank.org/dataonline/>.

⁹⁵ I considered the military expenditure data collected by the U.S. State Department, but that data was only available until 2005. See <http://www.state.gov/t/vci/rls/rpt/wmeat>. I also considered using data on interstate military disputes from the *Correlates of War* database, but at the time of drafting, that data was only available up to 2001. See <http://www.correlatesofwar.org/Datasets.htm>. Thus, I chose to use more comprehensive data for this measure of military exposure.

⁹⁶ Judith Kelley similarly used a measure of military spending to test the theory that states with relatively less military power were less likely to become involved in activities that fall under the ICC's jurisdiction, making them more likely to ratify the statute. Kelley, *Who Keeps International Commitments and Why?*, 579.

⁹⁷ Simmons, *Mobilizing for Human Rights*, 383.

domestic ratification process.⁹⁸ The categories are as follows: (1) treaties may be ratified by an individual chief executive or cabinet; (1.5) there is a rule or tradition of informing the legislature of signed treaties; (2) treaties may only be ratified upon consent of one legislative body; (3) treaties may only be ratified by a supermajority vote in one legislative body or by a majority vote in two separate legislative bodies.

To test the hypothesis that states following a common law tradition are more likely to ratify international human rights treaties than those following a civil law tradition, I include data on a state's legal tradition.⁹⁹ I measure this concept using a dichotomous variable indicating whether or not a state follows a common law legal tradition.

Finally, I include a control variable to measure the new democracy, "lock-in" theory advanced by Andrew Moravcsik. Using the Polity IV democracy measure, I create a dummy variable to account for those states that are new democracies. I code new democracies as those that became democracies – with a score of 7 or above on the Polity IV scale¹⁰⁰ – some time during the general negotiation phase of the ICC treaty and which have stayed democratic since that time. Because negotiations began in 1994, and because it is consistent with Moravcsik's argument to believe that a state would still be a transitional democracy if it only became a democracy shortly before the creation of the court, I chose 1990 as the cut-off date for new democracies.

⁹⁸ The source and detailed description of this data are available on Simmons' website at <http://scholar.iq.harvard.edu/bsimmons/mobilizing-for-human-rights>.

⁹⁹ The data for the variable were obtained from the Global Network Growth Database created by William Easterly and Hairong Yu, available at <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:20701055~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html#4>.

¹⁰⁰ Beth Simmons also used 7 as the number above which she considered countries to have transitioned to "democracy" in her work testing state commitment to and compliance with various international human rights treaties. *Mobilizing for Human Rights*, 385.

Control Variables: The Normative View

I also include several control variables in the model to account for the theories addressed under the normative view of treaty ratification. First, I include a measure to account for the idea that less-developed states may ratify treaties so as to appear to embrace the same norms as their more powerful and wealthier neighbors, and to receive the concomitant extra-treaty benefits that may accrue to them as a result. I use net official development assistance and official aid (“ODA”) in constant 2007 U.S. dollars as a share of GDP to measure this concept.¹⁰¹ ODA consists of the loans and grants made to developing countries.

I measure the concept concerning regional influence by looking at regional density of the ratification of the various treaties, articles, and optional protocols. Regional density computes ratification by countries in the same region up to the previous year. I classify countries by region using the seven World Bank categories: Sub-Saharan Africa, East Asia/Oceania; Eastern Europe/Central Asia; Latin America/Caribbean; Middle East/North Africa; South Asia; and the West (Western Europe, Australia, Canada, New Zealand, and the United States).¹⁰² Figure 2 shows States Parties to the ICC by region. Figure 3 shows regional ratification patterns over time.

¹⁰¹The data are obtained from the World Bank World Development Indicators, *available at* <http://devdata.worldbank.org/dataonline/>. Simmons used this same measure to capture the idea that states might be influenced to ratify human rights treaties because of the hope that by doing so they may obtain more access to aid. Simmons, *Mobilizing for Human Rights*, 385.

¹⁰² See <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,,pagePK:180619~theSitePK:136917,00.html>. Appendix C lists the countries in each of the categories.

Figure 2: ICC Treaty Ratification by Region (as of October 2010)

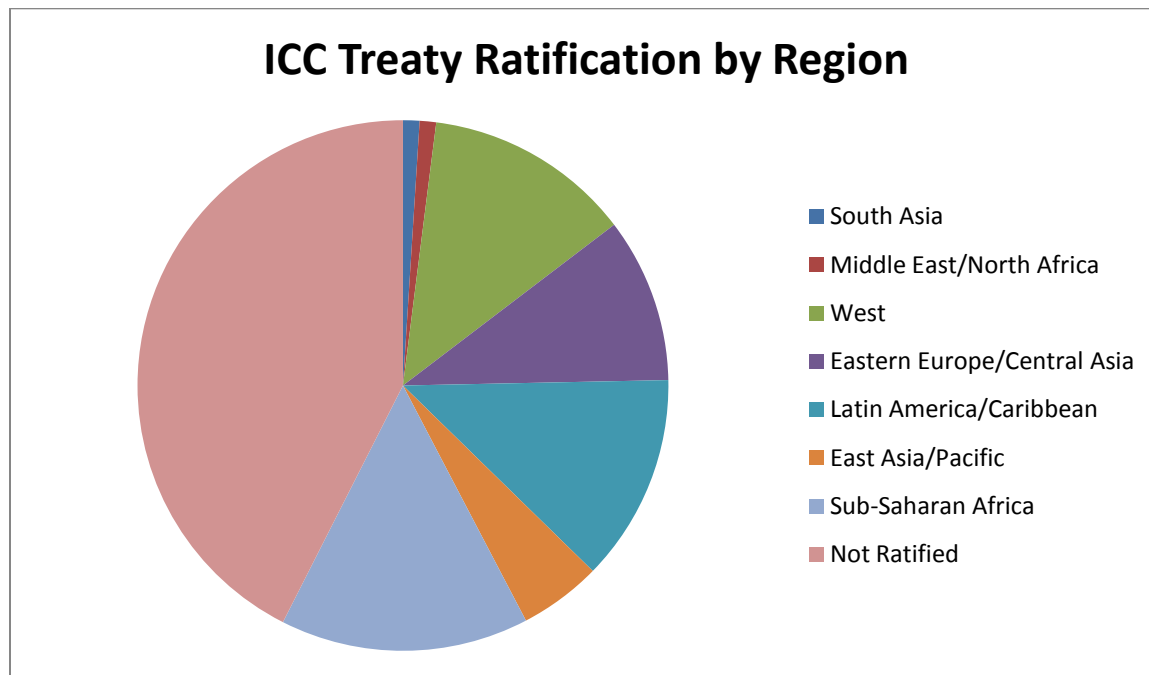
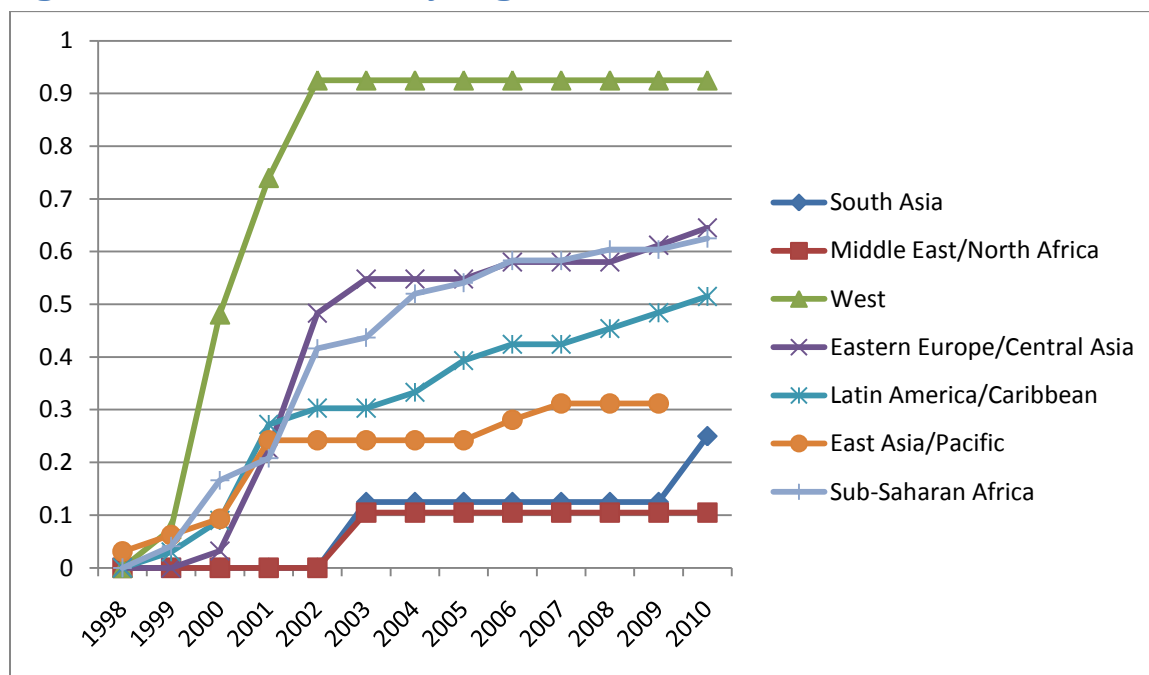


Figure 3: ICC Ratification by Region over Time



Finally, although a precise measure of NGO influence on state decisions to commit to the ICC may be impossible, I measure this concept using data on the number of NGOs in each state that are members of the Coalition for the International Criminal Court (the “CICC”).¹⁰³ The CICC is a network of over 2,000 NGOs advocating for state membership in a fair, effective, and independent ICC).¹⁰⁴

Table 3 provides summary statistics for the variables described above.

Table 3: Summary Statistics

Variable	Obs	Mean	SD	Min	Max
Level of Human Rights	8256	4.979	2.29	0	8
Genocide or Not	10208	.137	.344	0	1
Level of Domestic Law Enforcement Institutions	9720	-.065	.999	-2.686	2.116
Level of Democracy	7928	5.298	3.935	0	10
Level of Military Expenditure	7376	2.382	2.541	0	39.615
Difficulty of Domestic Treaty Ratification Process	8956	1.700	.654	1	3
Level of Economic Development	9324	7.669	1.604	4.191	11.263
Common Law State or Not	9102	.340	.472	0	1
Transitioning Democracy or Not	8320	.244	.429	0	1
Level of Aid or Assistance	9340	.086	.151	-.033	2.119
Regional Ratification	8504	.307	.291	0	.96
Level of NGO Presence	10208	13.723	33.585	0	305

¹⁰³ See <http://www.iccnw.org/>.

¹⁰⁴ Measuring this concept of NGO influence is difficult in many respects. First, only qualitative analysis and case studies may actually produce evidence of whether states were really influenced by NGOs to join the ICC. Second, the presence of NGOs in states or even state meetings with NGOs does not necessarily mean a state was persuaded by NGOs to change its behavior. In addition, the data I was able to obtain on NGO members in the CICC is not as precise as it could be. The data list the number of CICC-member NGOs as of March 2009. A more precise measure might account for NGO membership by state according to particular time-periods. However, I was advised by CICC personnel that such data were not maintained in that format.

Empirical Analyses and Discussion of Results

As an initial matter, examining the ratification patterns of the various states provides preliminary support for the credible threat theory and the idea that states act retrospectively and consider the costs of complying with treaty terms before committing to a treaty with relatively strong enforcement mechanisms. There is strong evidence that states with good human rights practices are most likely to commit to the ICC, while states with poor practices are reluctant to ratify. Table 4 shows that among states with better human rights ratings (those states with average physical integrity rights scores of between 5 and 8 for the period between 1996 and 2007), some 71% ratified the ICC treaty. Among states with worse human rights practices (those with average scores of below 5), only about 37% ratified the statute.

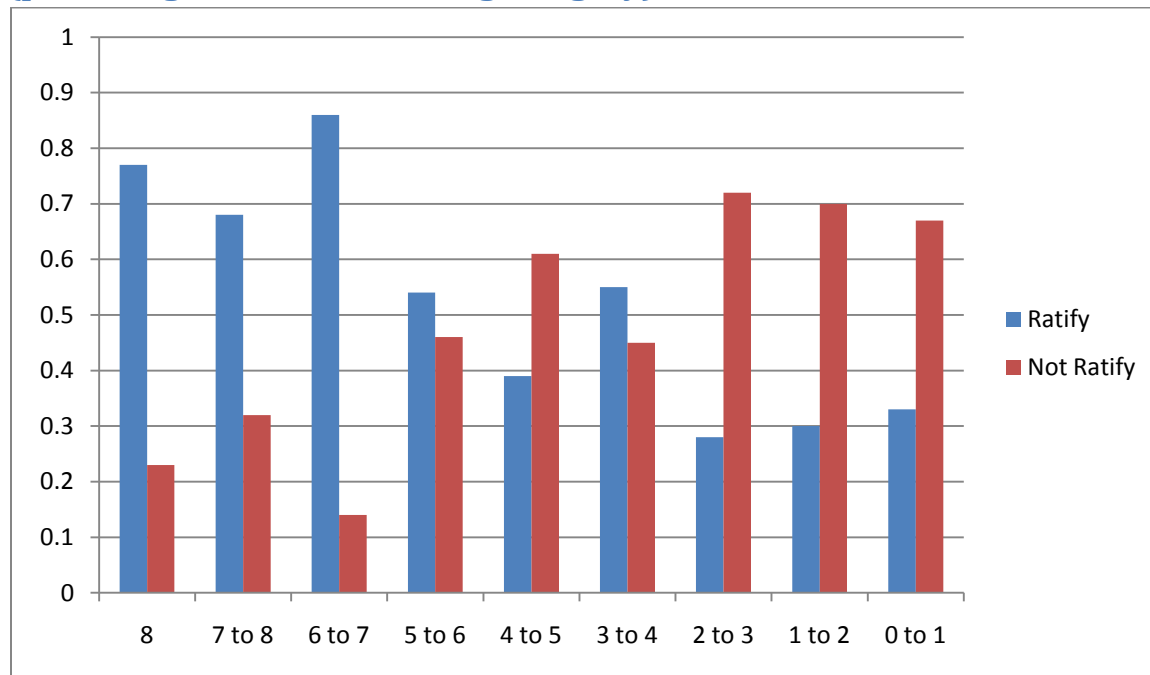
Table 4: ICC Treaty Ratification Patterns Based on Likelihood of Human Rights Violations

Better Human Rights Practices		Worse Human Rights Practices	
Ratify	Not Ratify	Not Ratify	Ratify
Albania, Andorra, Antigua, Australia, Austria, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia, Botswana, Bulgaria, Canada, Chile, Comoros, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, East Timor, Estonia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Latvia,	Bahamas, Bahrain, Bhutan, Brunei, Cape Verde, El Salvador, Grenada, Guinea-Bissau, Jamaica, Kuwait, Kyrgyzstan, Maldives, Mauritania, Micronesia, Moldova, Monaco, Nicaragua, Oman, Palau, Qatar, Sao Tome and Principe, Singapore, Solomon Islands,	Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Belarus, Cameroon, China, Cuba, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Kazakhstan, Kiribati, Laos, Lebanon, Libya, Malaysia, Morocco, Mozambique, Myanmar, Nepal, North Korea, Pakistan, Papua	Afghanistan, Argentina, Brazil, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Colombia, Congo, Democratic Republic of Congo, Dominican Republic, Ecuador, Georgia, Guinea, Jordan, Kenya, Liberia, Mexico, Nigeria, Paraguay, Peru, Senegal, South Africa, Tajikistan,

Lesotho, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Mali, Malawi, Malta, Marshall Islands, Mauritius, Mongolia, Montenegro, Namibia, Nauru, Netherlands, New Zealand, Niger, Norway, Panama, Poland, Portugal, Romania, Samoa, San Marino, Serbia, Sierra Leone, Slovak Republic, Slovenia, South Korea, Spain, St. Kitts & Nevis, St. Vincent and the Grenadines, Suriname, Sweden, Switzerland, Trinidad, United Kingdom, Uruguay	St. Lucia, Swaziland, Taiwan, Tonga, Tuvalu, Ukraine, United Arab Emirates, United States, Vanuatu	New Guinea, Philippines, Russia, Rwanda, Saudi Arabia, Sri Lanka, Sudan, Syria, Thailand, Togo, Tunisia, Turkey, Turkmenistan, Uzbekistan, Vietnam, Yemen, Zimbabwe	Tanzania, Uganda, Venezuela, Zambia
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Indeed, as seen in Figure 4, the great majority of states with average physical integrity rights scores of between 6 and 8 have ratified the Rome Statute. On the other hand, among states with the worst average physical integrity rights scores, the majority have refrained from ratifying the treaty.

**Figure 4: ICC Ratification by Average CIRI Human Rights Ratings¹⁰⁵
(percentage within each rating category)**



There is also evidence to suggest that the quality of a state’s domestic law enforcement institutions influences ICC commitment decisions. Looking at a snapshot in time using average rule of law scores, states with the best average rule of law scores (above 1), regularly ratified the ICC treaty – with an 85% ratification rate. States with the weakest domestic law enforcement institutions (those with average rule of law scores below -1),¹⁰⁶ however, were much less likely to ratify – only approximately 43%. Table 5 shows the ratification patterns of states with the best and worst domestic law enforcement institutions.

¹⁰⁵ As above, I took the average physical integrity rights rating for each state between 1996 and 2007.

¹⁰⁶ In their study of ICC commitment, Simmons and Danner similarly categorized states with World Bank Rule of Law scores of below -1 as those with the “weakest rule of law” when testing the robustness of their measure of “domestic accountability” – the idea that states would hold leaders accountable for any atrocities in violation of the ICC using their domestic institutions. “Credible Commitments and the International Criminal Court,” 246.

Table 5: ICC Treaty Ratification Patterns Based on Level of Domestic Law Enforcement Institutions

Best Domestic Law Enforcement Institutions		Worst Domestic Law Enforcement Institutions	
Ratify	Not Ratify	Not Ratify	Ratify
Andorra, Australia, Austria, Barbados, Belgium, Canada, Chile, Denmark, Finland, France, Germany, Iceland, Ireland, Japan, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom	Bahamas, Singapore, Tuvalu, United States	Angola, Belarus, Cameroon, Equatorial Guinea, Guinea-Bissau, Haiti, Iraq, Ivory Coast, Laos, Myanmar, North Korea, Rwanda, Solomon Islands, Somalia, Sudan, Turkmenistan, Uzbekistan, Yemen, Zimbabwe	Afghanistan, Burundi, Cambodia, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Guinea, Liberia, Nigeria, Sierra Leone, Tajikistan, Venezuela

In fact, a further examination of the ratification patterns of only those states with poor human rights practices provides additional support for the credible threat theory – and evidence contrary to the explanatory power of the credible commitment theory. As is shown in Table 6 below, among states with poor human rights practices, non-democratic states are not more likely than democratic states to commit to the ICC. In fact, the evidence shows that non-democratic states with poor human rights practices are far more likely to avoid the ICC than commit to it. About 68% of those states did not ratify the Rome Statute. By contrast, amongst democratic states with poor human rights practices (although there are few of them), about 54 % ratified the treaty. Comparing the ratification patterns of the non-democracies to the democracies shows that democracies with poor practices are much more likely than non-democracies with poor practices to commit to the ICC since about 54% of the democracies ratified, whereas only about 32% of the non-democracies ratified.

All of this evidence about the ratification patterns of states with poor human rights practices is consistent with the credible threat theory which predicts that because the ICC has relatively strong enforcement mechanisms, states will be retrospective in their calculations and consider whether their past and present practices might make commitment unduly costly. Indeed, non-democratic states with poor practices are particularly likely to avoid committing to the ICC – evidence which is clearly inconsistent with the credible commitment theory. The evidence does not suggest that non-democracies with poor practices are joining the ICC so that they can tie their hands and commit to their domestic audiences to better those practices in the future because of the external enforcement mechanisms a treaty like the ICC can provide. Instead, the evidence shows that states without internal enforcement mechanisms and without domestic checks on their power are reluctant to commit to the ICC because commitment would entail a costly loss of their sovereignty and reduce their power to rule and punish as they wish.

Democracies with poor practices, on the other hand, have reason to view ICC commitment as imposing fewer risks to their sovereignty. Those states presumably already have some domestic checks on their power – perhaps in the form of an independent judiciary that will punish perpetrators of mass atrocities, even if those perpetrators happen to be government agents or others with whom the government was complicit. Although those states still run the risk that their government or citizens will commit crimes covered by the ICC treaty, they may believe that such crimes would be punished domestically in any event – meaning that they would not risk losing the case to The Hague. For these democratic states with poor practices, ICC commitment may not reduce government power. Rather, commitment may potentially increase their power in that the ICC provides another back-up forum in which opposition powers can be punished should they commit mass atrocities and should domestic law enforcement institutions otherwise fail to

be effective at bringing them to justice.

Table 6: ICC Treaty Ratification Patterns for States with Poor Human Rights Practices Based on Whether Democracy or Not

Democracy¹⁰⁷		Non-Democracy	
Ratify	Not Ratify	Not Ratify	Ratify
Argentina, Brazil, Colombia, Dominican Republic, South Korea, Mexico, South Africa	Guatemala, India, Israel, Thailand, Philippines, Turkey	Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Belarus, Cameroon, China, Cuba, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Haiti, Indonesia, Iran, Iraq, Ivory Coast, Kazakhstan, Kiribati, North Korea, Laos, Lebanon, Libya, Malaysia, Morocco, Mozambique, Myanmar, Nepal, Pakistan, Papua New Guinea, Russia, Rwanda, Saudi Arabia, Sri Lanka, Sudan, Syria, Togo, Tunisia, Turkmenistan, Vietnam, Yemen, Zimbabwe	Afghanistan, Burundi, Cambodia, Central African Republic, Congo, Democratic Republic of Congo, Ecuador, Georgia, Guinea, Jordan, Kenya, Liberia, Nigeria, Peru, Senegal, Tajikistan, Tanzania, Uganda, Venezuela, Zambia

True, one might expect that if states view the ICC's enforcement mechanisms as a credible threat, no states with poor human rights practices or biased or weak domestic law enforcement institutions would risk ratifying the treaty. But, clearly some have. One caution is

¹⁰⁷ Again, as did Beth Simmons in her book, *Mobilizing for Human Rights*, I used 7 as the number above which states were classified as democracies.

that these results only capture a snapshot in time. Event history analysis factors in the precise timing of state decisions to commit to the ICC as it relates to the time varying and constant variables. Moreover, case study analysis should help in determining what other factors or mechanisms may have caused these states to act contrary to theory.

In this case, the event history analysis provides additional support for the idea that states view the ICC treaty's enforcement mechanisms as a credible threat and make their commitment decisions based on retrospective calculations about the costs to them of complying with treaty terms. Table 7 presents results from three multivariate event history models testing the rate of becoming party to the ICC treaty. In Model 1, I report the results of the baseline model for ratification which includes the main variables of interest: level of human rights practices and level of domestic law enforcement institutions. In Model 2, I add the control variables that measure other costs of treaty ratification suggested by the various rationalist view theories. Finally, Model 3 includes the control variables suggested by the normative view theories.¹⁰⁸

Most supportive of the credible threat theory – and the idea that states engage in retrospective, rather than prospective calculations when making ratification decisions – is the fact that in every model, the variable measuring a state's level of human rights practices is a highly significant and positive predictor (at the 1% level) of ICC treaty ratification. States with good human rights practices are quite likely to join the ICC: with each unit increase in a state's human right rating, a state becomes between 30% and 38% more likely to commit (see hazard ratio of 1.307 Model 1 and hazard ratio of 1.380 Model 3).¹⁰⁹

¹⁰⁸ I used the exact method for ties because the data contains tied event times where states do ratify in the same quarter.

¹⁰⁹ Judith Kelley similarly found that a state's human rights ratings were a positive and significant predictor of ICC ratification. However, Kelley's focus of inquiry was on state decisions to sign bilateral immunity agreements, and her ratification model used logistic regression (which is arguably less precise than the event history model which takes timing of ratification into consideration and which includes time-varying covariates). Furthermore, her test of ratification behavior was only preliminary to that primary inquiry and included very few independent variables.

The other compliance costs predictors on which my theory particularly rests – past genocide and the level of a state’s domestic law enforcement institutions – are not significant in any of the models, suggesting that states may not factor in their past genocides specifically or their ability to domestically prosecute any violations of the Rome Statute when making ICC commitment decisions. Instead, the evidence indicates that in terms of precise compliance costs, states may be most concerned with their general level of human rights practices. If a state’s practices and policies are such that its government or citizens should not commit mass atrocities, then whatever its capacity to prosecute such atrocities domestically, it can still calculate that committing to the ICC will carry minimal costs related to noncompliance.¹¹⁰ By contrast, where the state’s practices and policies are such that it might expect its government or citizens to commit mass atrocities, it may still conclude that commitment is unduly costly even though it may believe its domestic law enforcement institutions are sufficiently independent and capable of prosecuting any such atrocities. As discussed above, because the ICC prosecutor and court are empowered to determine whether the state is “willing” or “able” to prosecute mass atrocities domestically, most states with poor practices may conclude that the complementarity provision does not give them enough protection against a costly loss of their sovereign right to mete out justice within their own borders.

“Who Keeps International Commitments and Why?,” 578-80. On the other hand, Goodliffe and Hawkins found little evidence that a state’s human rights practices predicted whether the state supported a strong and independent ICC based on statements made during Rome Statute negotiations. Of course, that study did not look at state ratification decisions, but instead quantified state positions regarding the court and commitment to it by coding statements state representatives had made during various negotiations of the Rome Statute. “A Funny Thing Happened on the Way to Rome.” As noted above, Simmons and Danner included no measure for the level of a state’s human rights practices other than whether the state experienced a recent civil war. “Credible Commitments and the International Criminal Court.”

¹¹⁰ As a robustness check, I ran the models using data from the Political Terror Scale 1976-2008 instead of the human rights measure based on data from the Cingranelli-Richards Human Rights Dataset. The results still support the credible threat theory. In each of the models, a state’s level of human rights was a significant and positive predictor of ratification at the 5% level. In each instance, however, there were fewer observations and between 10 and 27 fewer countries included in the models. As noted above, that scale only collected data for 185 countries, whereas the Cingranelli-Richards dataset includes human rights ratings for 195 countries.

On the other hand, the democracy variable is a positive and significant predictor of ICC ratification in both models in which it was included. With each unit increase in its democracy rating, a state is between 10% and 16% more likely to commit to the ICC (see hazard ratio of 1.105 Model 2 and hazard ratio of 1.163 Model 3). Even though democracy is not a primary indicator of potential compliance with the precise terms of the treaty, democracies more than autocracies tend to have the kinds of policies, laws, practices, and institutions, that favor protecting human rights.¹¹¹ Thus, the significance of this variable provides some further support for the credible threat theory and the idea that retrospective calculations about the ability to comply with treaty terms influence state ratification behavior.

In addition, however, the positive significance of the democracy variable may provide some support for the idea that the complementarity provision and the ability of the state's law enforcement institutions to conduct independent and capable investigations and prosecutions plays a role in the ICC ratification behavior of some states. One of the democracy variable's components measures constraints on the chief executive, which should include things like checks and balances limiting state power and the independence of the judiciary. It may be that where power is not concentrated and where the state already has limits on its power to do as it pleases, it will conclude that commitment to the ICC will not entail a significant loss of sovereignty. By contrast, and contrary to the predictions of the credible commitment theory, where the state is an autocracy and has no domestic limits on its power, it will conclude that ICC commitment will entail a costly loss of sovereignty and a reduction in its own powers. And, as shown in Table 6, there is support for the idea that even amongst states with poor human rights practices, those that are more likely to commit to the ICC are those that are also democracies – states that already operate with constraints on their power.

¹¹¹ Cole, "Sovereignty Relinquished?," 475.

Indeed, the results of this event history analysis not only provide compelling support for the credible threat theory, but they also provide evidence discrediting the explanatory power of the credible commitment theory advanced by Simmons and Danner. The evidence suggests that states guard their sovereignty and calculate treaty commitment costs by looking retrospectively and seek to determine their ability to comply with treaty terms before committing to an international human rights treaty with relatively strong enforcement mechanisms that can be used to hold them accountable. The evidence shows that states with good human rights practices and democratic states are more likely to join the ICC. States with poor human rights practices and non-democratic states are less likely to commit to the court. Therefore, at least where enforcement mechanisms are strong, no evidence suggests that states abandon sovereignty concerns and commit to an international human rights treaty that can hold them accountable where they have otherwise decided not to impose upon themselves any domestic accountability mechanisms. Certainly, as noted above, some states with poor practices have committed to the court, but the empirical evidence does not demonstrate a trend towards commitment without an ability to presently comply with treaty terms.

Table 7: Cox Proportional Hazards Models Explaining Ratification of the ICC Treaty

Independent Variable	Model 1	Model 2	Model 3
Level of Human Rights Practices (Physical Integrity)	1.307*** (.000)	1.323*** (.004)	1.380*** (.003)
Past Genocide or Not	.651 (.333)	.375 (.107)	.385 (.129)
Quality of Domestic Law Enforcement (ROL World Bank)	1.249 (.104)	1.428 (.256)	1.453 (.266)
Level of Democracy	--	1.105** (.053)	1.163** (.021)
Level of Military Expenditure	--	.789** (.031)	.837 (.125)
Difficulty of Domestic Treaty Ratification Process	--	1.382 (.148)	1.391 (.200)
Level of Economic Development	--	.867 (.380)	.641 (.073)
Common Law State or Not	--	.935 (.837)	.758 (.468)
Transitioning Democracy or Not	--	--	.553 (.123)
Level of Aid or Assistance		--	.013 (.097)
Regional Ratification	--	--	4.353 (.103)
Level of NGO Presence	--	--	.997 (.511)
# of Countries	184	126	123
# of Ratifications	91	65	62
# of Observations	4245	2860	2827

, *= 5%, 1% significance

In addition, the significant and negative effect of a state's level of military expenditure on ratification in Model 2 lends some additional support to the credible threat theory. States with greater military expenditures were less likely than states with lower expenditures to commit to the ICC, suggesting that states with more military exposure view noncompliance with the ICC

treaty as more costly than states with less exposure. Of course, because the United States and China have not joined the court, and because both have large military budgets, caution may be warranted in interpreting these particular results.

Arguably, a state's level of economic development might also influence its ability to comply with a human rights treaty if we assume that countries that are economically developed are also those that are more likely to embrace progress and post materialist values – such as the need to protect citizens against human rights abuses. However, the economic development variable was not a significant and positive predictor of ICC commitment in either of the models in which it was included. On the other hand, the indicator for that variable is highly correlated with the indicator for the state's level of domestic law enforcement institutions which may mean that the two variables are overlapping in capturing effects. To ensure that the models were not being compromised as a result of these high correlations, I ran Models 2 and 3 without the indicator for economic development (the variable that had only been included as a control). In each case, the results for the remaining variables did not differ substantially from the results of the models which included the economic development measure.

Regarding the other theories for which control variables were added in the models, they were not supported by the event history analysis. First, where ICC ratification is concerned, it appears that other costs such as domestic ratification difficulties or uncertainty costs based on a country's legal traditions are less of a concern than the state's actual costs of complying with treaty terms. Nor was there any support for the idea that governments in the process of a democratic transition ignore compliance costs and the credible threat associated with committing to treaties with relatively strong enforcement mechanisms because of the future benefits they may gain by locking-in those democratic practices for future governments. Instead, the event

history analysis provides support for the credible threat theory and the idea that states are more retrospective in making calculations about the likely consequences of treaty commitment, particularly where, as here, the treaty's enforcement mechanisms are relatively strong. Furthermore, the quantitative evidence does not suggest that state decisions to commit to the ICC are generally and significantly driven by normative concerns. None of the variables included to test normative theories was a positive and significant predictor of ICC ratification. Yet, importantly, the addition of all of these control variables to account for other theories did not alter the significance of the human rights variable, thus lending additional support for the explanatory power of the credible threat theory.¹¹²

In sum, both the positive and null results are consistent with the credible threat theory which predicts that where an international human rights treaty contains legally-binding enforcement mechanisms backed by resources to punish noncompliant behavior, states are motivated by rationalist concerns: states are more likely to commit where retrospective calculations about their ability to comply with treaty terms indicates that commitment will pose only minimal sovereignty costs. Where treaties contain weak enforcement mechanisms, even a rational state may commit without intending to or being able to comply if it can envision other intangible or indirect benefits – such as increased trade – that may flow from commitment. But, with weak enforcement mechanisms, the costs of noncompliance may be easily outweighed by such potential benefits. Where treaty mechanisms are stronger, the calculation is different. The quantitative evidence suggests that on the whole, states making commitment calculations in such

¹¹² Substituting different measures of military exposure and domestic law enforcement institutions in the final model also did not alter the significance of the human rights variable: it was still a significant and positive predictor of ICC ratification at the 1% level. For the military exposure concept, I used various measures obtained from the U.S. State Department data which is reported up to 2005: (1) military expenditure in constant U.S. dollars; (2) military expenditure per capita; and (3) armed forces in thousands. I used the Political Risk Services Group International Country Risk Guide Law and Order measure (on a scale of 1 to 6 and for 161 countries) as a substitute for the World Bank Rule of Law measure (which dataset includes more than 200 countries).

circumstances are primarily concerned with the consequences of failing to comply with treaty terms.

CHAPTER FOUR

TESTING STATE COMMITMENT IN THE CONTEXT OF OTHER INTERNATIONAL HUMAN RIGHTS TREATIES

Chapter Three provided evidence that states view the ICC treaty's enforcement mechanisms as a credible threat: states with poor human rights practices were less likely than states with better human rights practices to readily and promptly join the court. In fact, with each unit increase in a state's human right rating, a state becomes between 30% and 38% more likely to join the court. States that were more democratic were also more likely to commit to the ICC. This chapter will further test the credible threat theory by comparing state decisions to commit to the ICC to decisions to commit to the other main international human rights treaties, their articles, and optional protocols.

This chapter is an important test of the implications of the credible threat theory. Simply put, the focus on ICC ratification only allows us to look at one enforcement mechanism which is constant for all states. But, in this case, there are many other international human rights treaties, all of which are designed to protect against human rights abuses, but which have a variety of different enforcement mechanisms. Comparing state decisions to commit to these treaties with these differing levels of enforcement mechanisms allows for a better test of the credible threat theory. We should see that where enforcement mechanisms are weak, states will more readily commit to international human rights treaties even if their domestic human rights practices are poor such that they may not be able to or intend to comply with treaty terms. And, we can compare that state behavior to how states act when the enforcement mechanisms are stronger, as they are in the ICC treaty.

As discussed in more detail below, I categorize these treaties according to the level of their associated enforcement mechanisms. If the credible threat theory is correct, I expect states

with poor human rights practices will readily commit to treaties with weak enforcement mechanisms, but will be wary of committing to treaties with stronger enforcement mechanisms. In particular, states with poor records should be less likely than states with good records to join the ICC.

In this chapter, I first describe the various international human rights treaties that will be used to empirically test state commitment behavior and explain the system for categorizing those treaties according to their levels of enforcement mechanisms. I then explain the research design for the quantitative study. Finally, I present and discuss the results of the empirical analyses.

International Human Rights Treaties and their Enforcement Mechanisms

Motivated by the destruction caused by World War II, the international community created a human rights regime designed to protect the basic human rights of all individuals.¹¹³ The international treaties at the foundation of this regime are the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), both of which were opened for signature and ratification in 1966 and came into force in 1976.¹¹⁴ Additional international human rights treaties followed, and the regime now boasts six primary treaties, to which the great majority of states have committed. (See Table 8 for a list of the six primary international human rights treaties.)

¹¹³ Thomas Buergenthal, “The Normative and Institutional Evolution of International Human Rights,” *Human Rights Quarterly* 19 (1997); Youcef Bouandel, *Human Rights and Comparative Politics* (Brookfield: Dartmouth Publishing Co., 1997); James R. Vreeland, “Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture,” *International Organization* 62 (2008).

¹¹⁴ Buergenthal, “The Normative and Institutional Evolution of International Human Rights,” 705.

Table 8: The Six Primary International Human Rights Treaties

Treaty	Year Open	Rights Protected	Parties¹¹⁵
International Covenant on Civil and Political Rights (ICCPR)	1966	Life, Liberty, Freedom from Torture and Slavery	166
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1966	Economic, Social, and Cultural Rights	160
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	1966	Fundamental and Human Rights for Persons of All Races	173
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	1980	Fundamental and Human Rights for Women	185
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	1984	Freedom from Torture and Other Forms of Punishment	147
Convention on the Rights of the Child (CRC)	1989	Fundamental and Human Rights for Children	193

In the international human rights context, treaty enforcement mechanisms are most typically under the control of a committee of experts established pursuant to the text of the treaty. Of the various enforcement mechanisms, those which require only that the state self-report compliance with the treaty's mandate are the weakest. Although exact reporting time periods vary, usually states are required to report at some regular interval on the measures they have adopted to give effect to the treaty's pronouncements.¹¹⁶ Committees reviewing these reports can question states about them and also make comments about the state's level of treaty compliance. Self-reporting requirements are particularly weak enforcement mechanisms because they lack clear and precise obligations, and also, the body to which states have delegated authority to consider the reports has no power to absolutely compel reports – or, for that matter, better human rights practices. According to Jack Donnelly, by filing even a pro forma report, the

¹¹⁵ States parties are listed as of 2010.

¹¹⁶ For example, see ICCPR, Art. 40; ICESCR, Art. 16 and 17; CERD, Art. 9; CEDAW, Arts. 18 and 21; CAT, Art. 19; and CRC, Art. 44.

state will have formally discharged its reporting requirement. Furthermore, “[c]ommittees cannot always ensure that the required reports are submitted.”¹¹⁷ Moreover, Donnelly notes that many of the reports submitted by states contain little more than extracts of laws or obviously false or evasive information about the state’s compliance records.¹¹⁸ Nevertheless, having submitted the report, a state will have discharged its obligations under treaty terms.

International human rights treaties – by their articles or optional protocols – do have more onerous enforcement mechanisms to which states can also bind themselves. First, states can agree on the committee’s competence to hear complaints by other states claiming that they are not living up to their obligations under the treaty.¹¹⁹ On paper, this enforcement mechanism appears stronger than the self-reporting requirement since it at least requires state parties to submit to a grievance procedure before an independent committee. Nevertheless, in the present system, committees are not empowered to order a remedy for any violations they find: if the matter cannot be resolved via negotiation, the committee is generally limited to summarizing its activities in a report.¹²⁰ Moreover, according to the website for the Office of the High Commissioner for Human Rights, as of August 2010, the procedures for interstate complaints had never been used.¹²¹

In addition, some treaties provide that states can agree on committee competence to receive and consider complaints by individuals alleging that their rights under the treaty have been violated – if the individuals have, among other things, exhausted available domestic remedies. Several of the main international human rights treaties include articles or optional

¹¹⁷ Donnelly, 2003, 173-74.

¹¹⁸ Donnelly, *International Human Rights*, 85.

¹¹⁹ For example, under Article 41 of the ICCPR states may authorize the Human Rights Committee to hear interstate complaints, but only if both state parties have formally acknowledged the Committee’s competence to receive and consider inter-state communications. The provisions of Article 21 of the CAT are similar.

¹²⁰ For example, see ICCPR, Art. 41(h) and CAT, Art. 21 (h).

¹²¹ See <http://www.2.ohchr.org/english/bodies/petitions/index.htm>.

protocols with this additional enforcement mechanism.¹²² The individual complaints are heard by a committee empowered to consider evidence and issue decisions. In some cases, the committee may also invite the state party to submit written responses to the views stated in the committee's decision and to comment on action taken as a result.¹²³ However, even then, none of these optional procedures associated with the six main international human rights treaties grants to the committee any powers to issue legally binding decisions. Rather, committee powers are essentially limited to encouraging compliance and issuing reports of its actions.¹²⁴ The committees have "no authority to act punitively against the offending state, or impose any sanctions."¹²⁵

Although there is not an enormous difference between the latter two enforcement mechanisms in terms of the precision of their requirements or the power of the committees, I conclude the individual complaint mechanism may be costlier for states for several reasons. States should expect more individual complaints than state complaints because individuals within a state are more likely than other states to actually know of the actual state's human rights practices. There are also more individuals in a state than there are other states. In addition, the interstate complaint procedure has apparently not been used, a fact which later-ratifying states would know when considering the strength of that enforcement mechanism. By contrast, the various committees have considered individual complaints and rendered decisions. Again, however, those decisions are not subject to appeal, and if the committee decides in favor of the

¹²² The First Optional Protocol to the ICCPR ("ICCPR Optional Protocol") provides for individual complaints against states alleging violations of the ICCPR. Similar provisions are contained in Article 14 of the CERD, Article 22 of the CAT, and in the Optional Protocol to the CEDAW.

¹²³ For example, in Article 7, the CEDAW Optional Protocol permits the Committee to seek comments and reports on actions taken by states.

¹²⁴ For example, see the ICCPR Optional Protocol, Arts. 5 and 6 and the CEDAW Optional Protocol, Arts. 7 and 12.

¹²⁵ Steiner, "Individual Claims in a World of Massive Violations," (discussing the ICCPR Human Rights Committee).

individual, it cannot force a remedy: it is limited to inviting the state party to show how it has resolved the issue.

Under the Optional Protocol to the CAT, states may commit to a seemingly stronger enforcement mechanism. By that Optional Protocol, states bind themselves to recognize the competence of a Subcommittee on Prevention to regularly visit any place under its jurisdiction and control where persons are held in detention by the government or with its acquiescence (Articles 4 and 11). The visits are undertaken in an effort to strengthen, if necessary, the detainees' rights to be protected against torture and other cruel and inhuman punishment (Article 4). In connection with the visits, parties agree to provide all relevant information to the subcommittee, as well as access to private interviews of detainees – without the presence of witnesses (Articles 12 and 14). Pursuant to Article 16, the subcommittee is authorized to publish reports of its investigations, together with any comments the state party may wish to include. In the event the state party does not cooperate with the subcommittee and authorize access to information and interviews, or refuses to take steps to improve a situation identified by the subcommittee, the subcommittee may – after the state party has had an opportunity to make its views known – make a public statement concerning the matter or publish a report about it (Article 16).

The committee with oversight of the CAT Optional Protocol, like the other committees, is generally limited at the conclusion of its investigation to encouraging compliance and making comments or reports. Nevertheless, I suggest the enforcement mechanism associated with the CAT Optional Protocol is stronger than those described above because it requires states to allow an independent body onto sovereign territory and grant access to citizenry or other prisoners under state control. While not all states will necessarily comply with that requirement,

sidestepping the requirement is certainly not as easy as filing a pro forma report. Furthermore, neither of the complaint procedures purports to bind the state parties to allowing the committee to visit territory and conduct its own investigation of the facts.

Based on the above, I create five categories of enforcement mechanism which I arrange from weakest to strongest as follows: (1) the state agrees to a reporting requirement; (2) the state recognizes committee competence to hear state complaints; (3) the state recognizes committee competence to hear individual complaints; (4) the state agrees to permit committee visits to its territory to engage in investigations; and (5) the state agrees to authorize an independent body to prosecute its government or citizenry for human rights crimes. Table 9 lists the 14 treaties, articles, or optional protocols which I include in this study (together with the date they were available for ratification), and organizes them by their associated levels of enforcement mechanisms.

Table 9: 14 Human Rights Treaties and Levels of Enforcement Mechanisms

Level of Enforcement	Description of Mechanism	Human Rights Treaty
1–weakest	State must file reports	ICCPR (1966); ICESCR (1966); CERD (1966); CEDAW (1980); CAT (1984); CRC (1989)
2–weak	States make complaints to committee	Article 41 ICCPR (1966); Article 21 CAT (1984)
3–moderate	Individuals file complaints with committee	Optional Protocol ICCPR (1966); Article 14 CERD (1966); Article 22 CAT (1984); Optional Protocol CEDAW (1999)
4–stronger	Committee may visit state	Optional Protocol CAT (2003)
5–strongest	Independent prosecutor investigations	ICC (1998)

Methodology

As I did with the models testing state commitment to the ICC, here I also employ the Cox

proportional-hazards model to analyze the extent to which both constant and time-varying factors influence the probability that a state will ratify a particular international human rights treaty in a given time period. The results will be reported as hazard ratios, which will indicate the proportionate influence a given factor has on a state's decision to commit to a particular treaty.

I conduct separate, but parallel, analyses for each of 14 different treaties. Appendix B contains a list of the 14 different treaties and shows the states that are parties to each.

Dependent Variables

Ratification data on the 14 different international human rights treaties were coded from records maintained by the United Nations. The data is assembled at yearly intervals for more than 190 countries between 1966 and 2008. Countries existing at the time the treaty was adopted and available for ratification are “at risk” of ratifying during that year. Countries established after the treaty was available for ratification enter the risk set upon independence – the time when they are eligible to ratify as a sovereign state. Countries at risk are given a value of 0 until such time as they ratify the instrument in question. At the time of ratification, countries are assigned a value of 1. Countries that did not ratify by 2008, when the observation period here ends, are right-censored.

Independent Variables

The Main Explanatory Variable: Level of Human Rights Practices

As with the statistical tests of state commitment to the ICC, my primary focus is on the direct costs of complying with treaty terms. While each treaty does have its own terms and particular rights that it is designed to protect, all have in common that they are designed to protect against human rights abuses and to provide better treatment for all classes of individuals. Thus, in order to consistently test commitment across the various treaties, I use one main

explanatory variable to measure the state's ability to comply with treaty terms. In this case, that measure is the level of the state's human rights practices. Simply put, since the treaties by their terms all require states to adhere to good human rights practices, compliance should be easiest and less costly for those states with policies and practices that are consistent with treaty terms.¹²⁶

Here, I measure a state's level of human rights practices using the Political Terror Scale. Like the Cingranelli-Richards data on physical integrity rights, the Political Terror Scale is obtained from human rights reports issued by Amnesty International and the U.S. Department of State. The reports assign country scores by considering the presence of government practices that include murder, torture, forced disappearances, and political imprisonment. The scale ranges from 1 to 5, with 1 meaning torture and political imprisonments are rare and the country generally protects human rights. When possible, I average the two scores reported.¹²⁷ Data on these human rights practices are available beginning in 1976 and are reported from each year thereafter until 2008. Similar to Cole,¹²⁸ for the period between 1966 and 1976 (a time period relevant to the examination of several of the treaties), I extrapolate missing data points using a state's median score over the period from 1976-1984 if available. Again, because each of the treaties being tested is designed to generally protect human rights and promote better human rights practices, the data should adequately measure a state's tendency to have in place policies and practices that would enable it to comply with these treaties.

¹²⁶ I also considered including in some models testing commitment some independent variables that might capture some of the precise rights the treaties were designed to protect. For example, for the ICCPR, I considered using some measures of civil and political rights from Freedom House. However, I found that those measures were so highly correlated with the democracy measure that their inclusion in the model created multicollinearity problems that biased the results.

¹²⁷ Averaging the scores should help mitigate any bias from using only scores based on Amnesty International or the Department of State reports. In any event, Steven C. Poe, Neal Tate, and Linda Camp Keith, found similarity between the reports of both entities increased over time. "Repression of the Human Rights to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993," *International Studies Quarterly* 43 (1999).

¹²⁸ Cole, "Sovereignty Relinquished?"

I considered using the Cingranelli-Richards data for these quantitative tests since I used that data to test ICC ratification decisions. But, that data is reported beginning only in 1981, which makes it not as comprehensive for these purposes as the data from the Political Terror Scale which begins reporting human rights ratings in 1976. In this case, data beginning in 1976 is preferable since a number of the treaties in this study were available for ratification beginning in 1966 – an issue that did not arise when testing only state commitment to the ICC. In addition, and probably for the same reasons of data availability, the other studies which compare ratification decisions across international human rights treaties beginning in 1966 also use the Political Terror Scale to measure a state’s level of human rights. Specifically, the Cole study and the study by Wotipka and Tsutsui both used the Political Terror Scale data to measure whether rights-violating or rights-protecting countries were more likely to commit to international human rights treaties.¹²⁹ Accordingly, using that scale here will also better facilitate comparison to the results of those other studies.

Control Variables: The Rationalist View

Although my main explanatory variable measures a state’s level of human rights practices, I also include in these models most of the control variables – and the same measures – which were included in the models testing commitment to the ICC treaty. In particular, I include the following measures:

To test the idea that states with democratic governments are more likely than those with autocratic governments to ratify international human rights treaties, I use the Polity IV democracy measure, which is reported on a scale from 0 to 10.¹³⁰ I use the log of GDP per capita

¹²⁹ Cole, “Sovereignty Relinquished?,” 480; Wotipka and Tsutsui, “Global Human Rights and State Sovereignty,” 741.

¹³⁰ Marshall and Jaggers, “Polity IV Project: Dataset Users’ Manual.”

as a measure to test the hypothesis that more economically-developed states are more likely than less-developed countries to ratify international human rights treaties.

To measure the political costs associated with a state's domestic legislative treaty ratification process, I use the data provided by Beth Simmons which codes state ratification difficulty according to a four-category scale. To test the hypothesis that states following a common law tradition are more likely to ratify international human rights treaties than those following a civil law tradition, I include a dichotomous variable for whether or not the state follows a common law legal tradition.¹³¹ Finally, I use a dummy variable based on the Polity IV democracy measure to test the new democracy, "lock-in" theory advanced by Andrew Moravcsik. I code states as a 1 and as new democracies in a given year if they transitioned from anywhere below a 7 on the Polity IV scale to a 7 or above. If states were consistently above 7 for the Post-World War II period, I consider them to be stable democracies and code them 0. If states are consistently below a 7, I consider them non-democracies and also code them 0.

Control Variables: The Normative View

I include two control variables in the model to account for the theories addressed under the normative view of treaty ratification. First, I include a measure to account for the idea that less-developed states may ratify treaties so as to appear to embrace the same norms as their more powerful and wealthier neighbors, and to receive the concomitant extra-treaty benefits that may accrue to them as a result. I use net ODA in constant 2007 U.S. dollars as a share of GDP to measure this concept.¹³²

I measure the concept concerning regional influence by looking at regional density of the ratification of the various treaties, articles, and optional protocols. Regional density computes

¹³¹As before, this data is obtained from the Global Network Growth Database.

¹³²As before, this data is obtained from the World Bank World Development Indicators.

ratification by countries in the same region up to the previous year. I classify countries by region using the seven World Bank categories described above.

Table 10 provides the summary statistics for the independent variables described above that will be used to test commitment to all 14 international institutions.

Table 10: Summary Statistics for Common Independent Variables

Variable	Obs	Mean	SD	Min	Max
Level of Human Rights	6597	2.39	1.09	1	5
Level of Democracy	6498	4	4.18	0	10
Level of Economic Development	7015	7.52	1.56	4.13	11.26
Difficulty of Domestic Treaty Ratification Process	4834	1.57	.65	1	3
Common Law State or Not	8481	.34	.47	0	1
Transitioning Democracy or Not	6794	.17	.38	0	1
Level of Aid or Assistance	7059	.09	.16	-.03	2.68

Empirical Analyses and Discussion of Results

As an initial matter, an examination of state ratification patterns provides preliminary support for the idea that states view strong enforcement mechanisms as a credible threat. As Table 11 demonstrates, states with worse human rights practices are almost just as likely as states with better human rights practices to ratify international human rights treaties with the weakest enforcement mechanisms. However, where enforcement mechanisms are stronger, states with worse human rights practices are much more likely to avoid commitment.

Table 11: Ratification of the 14 Different Treaties Based on Human Rights Ratings¹³³

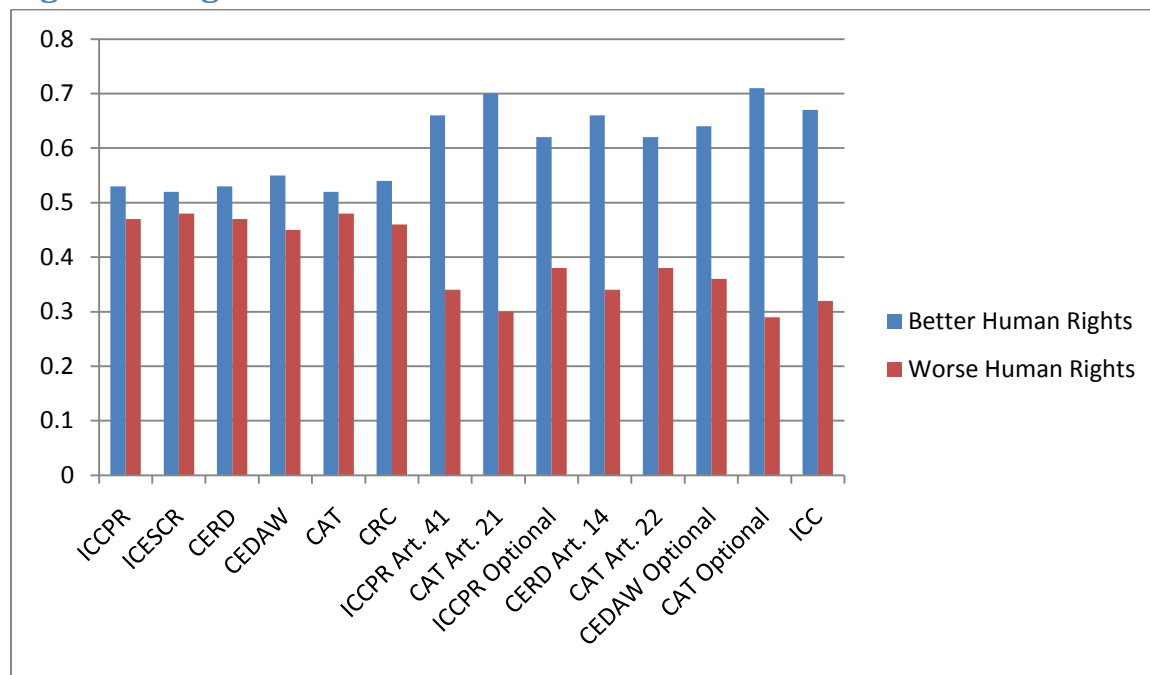
Treaty	Total Number Ratified¹³⁴	Number Ratified with Better Human Rights	Number Ratified with Worse Human Rights
ICCPR	157	83	74
ICESCR	154	80	74
CERD	162	86	76
CEDAW	171	95	76
CAT	139	73	66
CRC	174	95	79
ICCPR Art. 41	47	31	16
CAT Art. 21	56	39	17
ICCPR Optional	96	60	36
CERD Art. 14	47	31	16
CAT Art. 22	60	37	23
CEDAW Optional	89	57	32
CAT Optional	41	29	12
ICC	98	66	32

In fact, in every case where enforcement mechanisms go beyond self-reporting, states with worse human rights practices tend to account for only about 30% of the ratifying population. The figure below illustrates these ratification patterns.

¹³³ Consistent with the methodology used for the prior Table, I classified states with average human rights ratings of 2.5 and below during the relevant time periods during which the various treaties could be ratified as having better human rights practices. I classified states with average human rights ratings above 2.5 during the relevant time periods as having worse human rights practices.

¹³⁴ I obtained the total number of ratifying states from the data which ends in 2008. For each treaty, the total possible number of states that could have ratified was 178 since those were the states for which human rights data was available.

Figure 5: Ratification of the 14 Different Treaties Based on Average Human Rights Ratings



Examining the ratification patterns of states with the poorest human rights ratings¹³⁵ provides additional support for the credible threat theory. Table 12 shows the ratification behavior of these states in connection with the six main international human rights treaties and the ICC treaty. The evidence indicates that states with poorer human rights practices readily and regularly commit to international human rights treaties with the weakest enforcement mechanisms. However, states with poor practices less readily commit to the ICC.

¹³⁵ States with the poorest ratings are those that consistently averaged above 2.5 on the political terror scale (which ranges from 1 to 5) during each of the five time periods relevant to the seven treaties. Those time periods are 1965-2008 (ICCPR, ICESCR, and CERD); 1979-2008 (CEDAW); 1983-2008 (CAT); 1988-2008 (CRC); and 1997-2008 (ICC).

Table 12: Poorest Human Rights Countries and Ratifications

Country	Rat ICC	RatICCPR	RatICESCR	RatCERD	RatCedaw	RatCAT	RatCRC
Afghanistan	2003	1983	1983	1983	2003	1987	1994
Albania	2003	1991	1991	1994	1994	1994	1992
Algeria	--	1989	1989	1972	1996	1989	1993
Andorra	2001	2006	--	2006	1997	2006	1996
Bangladesh	2010	2000	1998	1979	1984	1998	1990
Brazil	2002	1992	1992	1968	1984	1989	1990
Burundi	2004	1990	1990	1977	1992	1993	1990
Cambodia	2002	1992	1992	1983	1992	1992	1992
Cameroon	--	1984	1984	1970	1994	1986	1993
Central Afr. Rep.	2001	1981	1981	1971	1991	--	1992
Chad	2006	1995	1995	1977	1995	1995	1990
China	--	--	2001	1981	1980	1988	1992
Colombia	2002	1969	1969	1981	1982	1987	1991
Congo (Brazzaville)	2004	1983	1983	1988	1982	2003	1993
DRC (Kinshasa)	2002	1976	1976	1976	1986	1996	1990
Cuba	--	--	--	1972	1980	1995	1991
Egypt	--	1982	1982	1967	1981	1986	1990
Equatorial Guinea	--	1987	1987	2002	1984	2002	1992
Eritrea	--	2002	2001	2001	1995	--	1994
Ethiopia	--	1993	1993	1976	1981	1994	1991
Georgia	2003	1994	1994	1999	1994	1994	1994
Guatemala	--	1992	1988	1983	1982	1990	1990
Guinea	2003	1978	1978	1977	1982	1989	1990
Haiti	--	1991	--	1972	1981	--	1995
Honduras	2002	1997	1981	2002	1983	1996	1990
India	--	1979	1979	1968	1993	--	1992
Indonesia	--	2006	2006	1999	1984	1998	1990
Iran	--	1975	1975	1968	--	--	1994
Iraq	--	1971	1971	1970	1986	--	1994
Israel	--	1991	1991	1979	1991	1991	1991
Kenya	2005	1972	1972	2001	1984	1997	1990
North Korea	--	1981	1981	--	2001	--	1990

Lebanon	--	1972	1972	1971	1997	2000	1991
Liberia	2004	2004	2004	1976	1984	2004	1993
Libya	--	1970	1970	1968	1989	1989	1993
Morocco	--	1979	1979	1970	1993	1993	1993
Mozambique	--	1993	--	1983	1997	1999	1994
Mexico	2005	1981	1981	1975	1981	1986	1990
Myanmar	--	--	--	--	1997	--	1991
Nigeria	2001	1993	1993	1967	1985	2001	1991
Pakistan	--	--	2009	1966	1996	--	1990
Papua New Guinea	--	2008	2008	1982	1995	--	1993
Paraguay	2001	1992	1992	2003	1987	1990	1990
Peru	2001	1978	1978	1971	1982	1988	1990
Philippines	--	1986	1974	1967	1981	1986	1990
Russia	--	1973	1973	1969	1981	1987	1990
Rwanda	--	1975	1975	1975	1981	2008	1991
Saudi Arabia	--	--	--	1997	2000	1997	1996
Sierra Leone	2000	1996	1996	1967	1988	2001	1990
Somalia	--	1990	1990	1975	--	1990	--
South Africa	2000	1998	--	1998	1995	1998	1995
Sri Lanka	--	1980	1980	1982	1981	1994	1991
Sudan	--	1986	1986	1977	--	--	1990
Syria	--	1969	1969	1969	2003	2004	1993
Tajikistan	2000	1999	1991	1995	1993	1995	1993
Thailand	--	1996	1999	2003	1985	2007	1992
Togo	--	1984	1984	1972	1983	1987	1990
Tunisia	--	1969	1969	1967	1985	1988	1992
Turkey	--	2003	2003	2002	1985	1988	1995
Uganda	2002	1995	1987	1980	1985	1986	1990
Ukraine	--	1973	1973	1969	1981	1987	1991
Uzbekistan	--	1995	1995	1995	1995	1995	1994
Venezuela	2000	1978	1978	1967	1983	1991	1990
Yemen	--	1987	1987	1972	1984	1991	1991
Zambia	2002	1984	1984	1972	1985	1998	1991
Zimbabwe	--	1991	1991	1991	1991	--	1990

Specifically, of the 66 countries with the poorest human rights ratings, 65 (all except Myanmar) ratified at least four of the six main international human rights treaties. All but 18

ratified all six treaties. By contrast, 39 of the 66 countries with the poorest ratings did not ratify the ICC treaty. Amongst the 39 countries that did not ratify the ICC treaty, some 24 had nevertheless ratified all six main international human rights treaties.¹³⁶

The results of event history analysis provide additional support for the idea that states view strong enforcement mechanisms as a credible threat and more readily commit to those treaties with stronger enforcement mechanisms only where they have concluded that they can comply with treaty terms – such that, commitment costs and the risks to state sovereignty are minimal. Tables 13 and 14 present the maximum likelihood coefficient estimates from event history analysis for ratification of the various international human rights treaties. The separate, but parallel, analyses for the 14 different international human rights treaties are shown based on their associated level of enforcement mechanism: from weakest to strongest. The results are reported as hazard ratios, which indicate the particular factor's proportionate influence on the decision to ratify. Numbers greater than one indicate an increase in the hazard rate of ratification. Numbers less than one indicate a decrease in the hazard rate.

¹³⁶ Results were consistent for countries that scored even higher on the political terror scale. For countries that consistently averaged above 2.8 during all relevant time periods, 29 of 43 did not ratify the ICC. However, all but Myanmar ratified at least four of the six main international human rights treaties. And, 17 of the 29 that did not ratify the ICC treaty nevertheless ratified all six of the main treaties.

Table 13: Weakest Enforcement Mechanisms

Level 1 Mechanism:							Level 2 Mechanism:		
State Reporting							State Complaints Against Other States		
Independent Variable	ICCPR	ICESCR	CERD	CEDA W	CAT	CRC	Independent Variable	Article 41 ICCPR	Article 21 CAT
Level of Human Rights	1.024 (.888)	.903 (.587)	.827 (.390)	1.066 (.687)	.917 (.509)	.961 (.751)	Level of Human Rights	1.042 (.898)	1.008 (.968)
Level of Democracy	1.20*** (.000)	1.20*** (.000)	1.030 (.586)	1.107** (.013)	1.043 (.246)	1.109** (.014)	Level of Democracy	1.155 (.115)	1.170** (.026)
Level of Economic Development	.737** (.026)	.680*** (.006)	.938 (.677)	.773 (.056)	1.119 (.350)	.620*** (.001)	Level of Economic Development	1.245 (.448)	1.585 (.055)
Difficulty of Ratification Process	.792 (.313)	.489*** (.004)	.547** (.032)	.837 (.418)	.849 (.386)	.702 (.095)	Difficulty of Ratification Process	.653 (.321)	.734 (.350)
Common Law or Not	.603 (.110)	.287*** (.000)	.576 (.109)	.412*** (.003)	.340*** (.000)	.438*** (.006)	Common Law or Not	1.632 (.410)	.473 (.105)
Transitioning Democracy or Not	.389 (.046)	.296** (.016)	1.079 (.885)	.892 (.785)	.986 (.967)	.917 (.813)	Transitioning Democracy or Not	.707 (.599)	1.220 (.670)
Level of Aid	.132 (.210)	.042 (.056)	.178 (.336)	.023** (.020)	.096 (.130)	.405 (.334)	Level of Aid	.789 (.953)	.120 (-.637)
Regional Ratifications	13.0*** (.000)	7.93*** (.003)	5.682** (.040)	1.28 (.750)	6.35*** (.002)	.647 (.636)	Regional Ratifications	14.775 (.062)	8.368** (.028)
# of Countries	74	73	57	69	107	82	# of Countries	121	129
# of Ratifications	57	55	51	65	80	81	# of Ratifications	18	34
# of Observations	1051	1056	610	491	1003	213	# of Observations	2594	1910

significant at .05; *significant at .01

Where enforcement mechanisms are weakest and require only self-reporting, the empirical results show no statistically significant correlation between a state's level of human rights practices and state ratification behavior. This finding is consistent with Wade Cole's regarding state commitment to the ICCPR and ICESCR – the two main international human

rights treaties he examined in his study testing commitment.¹³⁷ Thus, the rationalist view and the idea that states will calculate their ability to comply with treaty terms and the potential costs of noncompliance receives little support in predicting state commitment to these six main treaties. Indeed, the primary explanatory variable – a state’s level of human rights practices – is not significant in the tests for any of those treaties.

Instead, state ratification behavior concerning these six main international human rights treaties appears somewhat indiscriminate inasmuch as the results indicate no factor is consistently correlated with ratification. Of the factors that are significant predictors of ratification behavior for more than one of the six main treaties, the hazard ratios for the democracy, difficulty of ratification process, common law, and regional indicators are in the predicted direction. Democracies are more likely than autocracies to quickly ratify each of the ICCPR, ICESR, CEDAW, and CRC. States with more difficult ratification procedures were less likely to ratify the ICESCR and CERD. Common law states were less likely to commit to the ICESCR, CEDAW, CAT, and CRC. Regional ratification patterns positively influence ratification of the ICCPR, ICESCR, CERD, and CAT. But, while these factors did influence commitment in some cases, their influence was not in any way uniform across these treaties with the same enforcement mechanism. Only ratification of the ICESCR is significantly influenced by all four of these factors.

The remaining factor which is statistically significant for more than one of the main treaties is predictive in the direction opposite from that hypothesized based on theory and prior

¹³⁷ Cole, “Sovereignty Relinquished?,” 483. On the other hand, Wotipka and Tsutsui found that state’s human rights practices were significantly and negatively related to their tendency to ratify the six main human rights treaties. “Global Human Rights and State Sovereignty,” 746-47. However, those scholars did not separately test commitment to each of the human rights treaties as I do – and as Cole did for the two main treaties in his study. Rather, in Wotipka and Tsutsui’s study (739) the event examined was whether a state ratified any one of seven human rights treaties in a given year between 1965 and 2001.

literature. In particular, more economically developed states are less likely to ratify the ICCPR, the ICESCR, and the CRC. In sum, ratification of the main treaties does not seem to be influenced by any one factor, and the main compliance cost variable is not a significant predictor of ratification behavior in these cases where enforcement mechanisms are weakest.

The results of the tests of the treaties grouped in Enforcement Level 2 (interstate complaints) also lend support to the credible threat theory. Better human rights practices did not significantly and positively predict state ratification of either Article 41 of the ICCPR or Article 21 of the CAT. In those models, only democracy and regional ratifications are significant, and then only in with respect to ratification of CAT Article 21. Otherwise, none of the other indicators are significant predictors of ratification behavior suggesting that state decisions to ratify may not be based on a rational cost/benefit analysis. This is not a totally surprising result given that the interstate complaint enforcement mechanism appears relatively weak both on paper and in practice. The treaty terms make clear that committee power will be limited to trying to negotiate a resolution. In practice, the articles are not invoked. In addition, 26 of the 48 states that have ratified Article 41 of the ICCPR, for example, did not do so until 1990 or after (even though they could ratify beginning in 1966) – by which time states likely realized the provision for interstate complaints was not being invoked.¹³⁸ Thus, consistent with the findings of other studies, it appears that states may be ratifying some human rights treaties – those with weak enforcement mechanisms – only as window dressing and without concerns for their ability to comply with treaty terms.¹³⁹

In short, there is scant evidence that the costs of noncompliance drive state decisions to commit to international human rights treaties with weak enforcement mechanisms. The measure

¹³⁸ Thirty-four of the 60 states that ratified CAT Article 21 similarly did not do so until 1990 or after.

¹³⁹ Hathaway, “The Cost of Commitment;” Hafner-Burton and Tsutsui, “Human Rights in a Globalizing World.”

for human rights practices was not significant in any of the models testing state ratification of treaties categorized as having Level 1 and Level 2 enforcement mechanisms. Furthermore, the evidence showed that democracies were more likely to ratify only some of the eight treaties grouped in Levels 1 and 2. Moreover, other factors also influenced treaty ratification in some cases, and in some cases, those factors predicted ratification in ways that were contrary to theory.

Conversely, where the enforcement mechanisms are strongest, the empirical evidence suggests states do consider compliance costs and their level of human rights practices when making commitment decisions. As shown in Table 14, a state's level of human rights practices is a highly significant predictor of ICC ratification, and states with the worst human rights practices are much less likely to join the ICC. The hazard ratio of .523 indicates that states are about 50% more likely to join the ICC with each unit increase in their human rights practices (the scale ranges from 1 to 5 with 5 being the worst practices).¹⁴⁰ The democracy indicator of compliance is also significant for ICC treaty ratification. With each unit increase in its democracy rating, a state is about 20% more likely to ratify the ICC. These findings all support the credible threat theory: where enforcement mechanisms are strongest, states most able to comply with the ICC treaty requirements are also the most likely to ratify. Those less able to comply are less likely to ratify.

Again, these findings regarding ICC commitment lend support to the credible threat theory, but at the same time discredit the explanatory power of the credible commitment theory advanced by Simmons and Danner. In the case of the ICC, where enforcement mechanisms are

¹⁴⁰ As a robustness check, I also ran the Level 5 and Level 1 ratification models using the Cingranelli-Richards measure for human rights practices. The results similarly showed that states with better human rights practices were significantly more likely than states with poor practices to commit to the ICC (Level 5). In the models testing ratification of the human rights treaties with the weakest enforcement mechanisms (Level 1), this measure of a state's human rights practices (like the Political Terror scale measure) was not a significant predictor of state commitment.

strong, the evidence does not suggest that non-democratic states or states with poor practices are more likely to bind themselves to a treaty with which they cannot, or will not comply, so as to demonstrate a commitment to their domestic audience to end any cycle of civil violence.¹⁴¹ Indeed, as noted above, one might question why an autocratic state which has declined to impose upon itself domestic accountability mechanisms would willingly impose upon itself an international accountability mechanism that could result in government leaders being tried in The Hague. Instead, the evidence suggests that consistent with the credible threat theory, states with poor human rights practices and non-democracies – the very states that are likely to conclude that compliance with the ICC may be difficult and, hence, costly to their sovereignty – will be wary of joining the court and will avoid its strong enforcement mechanisms. And, one should expect that ICC commitment would be most costly for this category of states since commitment would entail a reduction of their power to rule domestically as they see fit – even if that means using violence and refusing to prosecute themselves or their compatriots who commit violent acts.

¹⁴¹ Simmons and Danner, “Credible Commitments and the International Criminal Court,” 234.

Table 14: Stronger Enforcement Mechanisms

Level 3 Mechanism: Individual Complaints					Level 4 Mechanism: Committee Visits		Level 5 Mechanism: Independent Prosecutor
Independent Variable	ICCPR Opt Protocol	Article 14 CERD	Article 22 CAT	CEDAW Opt Protocol	Independent Variable	CAT Opt	ICC
Level of Human Rights	.630** (.012)	.813 (.451)	1.129 (.538)	.832 (.256)	Level of Human Rights	.732 (.224)	.523*** (.000)
Level of Democracy	1.212*** (.001)	1.156 (.130)	1.137 (.061)	1.198*** (.000)	Level of Democracy	1.215 (.093)	1.230*** (.000)
Level of Economic Development	.622*** (.002)	.826 (.560)	1.335 (-.211)	.815 (.188)	Level of Economic Development	.691 (.213)	.743** (.047)
Difficulty of Ratification Process	.943 (.817)	1.191 (.572)	.683 (.202)	1.064 (.757)	Difficulty of Ratification Process	.832 (.592)	1.127 (-.565)
Common Law or Not	.325*** (.002)	.236** (.027)	.217*** (.004)	.554 (.070)	Common Law or Not	1.71 (1.000)	.939 (.845)
Transitioning Democracy or Not	1.113 (.776)	.885 (.819)	1.225 (.650)	.890 (.697)	Transitioning Democracy or Not	1.443 (.536)	.673 (.223)
Level of Aid	.056 (.109)	1.62 (.076)	.001 (.187)	.007** (.040)	Level of Aid	.008 (.234)	.134 (.269)
Regional Ratifications	1.010 (.888)	17.867** (.014)	9.400** (.018)	2.828 (.178)	Regional Ratifications	7.349 (.492)	7.389** (.019)
# of Countries	102	131	129	138	# of Countries	135	135
# of Ratifications	50	27	35	72	# of Ratifications	30	74
# of Observations	1862	2766	1922	846	# of Observations	600	848

significant at .05; *significant at .01

Where enforcement mechanisms are in the middle range, however, results are mixed and provide only minimal support for the credible threat theory. Supportive of the theory are the findings regarding commitment to the ICCPR Optional Protocol. Consistent with Cole's

findings,¹⁴² a state's level of human rights practices do significantly and positively predict ratification of the ICCPR Optional Protocol. In addition, another indicator of potential compliance – namely, a state's level of democracy – was also a significant and positive predictor of state ratification of the ICCPR Optional Protocol (since the hazard ratio of below one indicates that states with the poorest practices are less likely to join the court). On the other hand, human rights ratings did not predict ratification of the other three treaties allowing individual complaints. Instead, the only compliance measure that significantly predicted ratification of these three treaties was the democracy measure. But, that measure only predicted ratification of the CEDAW Optional Protocol.

One interesting finding regarding treaties with this level of enforcement mechanisms allowing for individual complaints (Level 3) is that normative concerns may influence commitment. Regional ratification rates positively and significantly influenced ratification of CERD Article 14 and CAT Article 22. Thus, states may have joined these treaties because they wanted to appear legitimate (and perhaps reap potential extra-treaty benefits) by embracing the norms favored by their neighbors.

On the other hand, another interpretation of these null results is that states do not view the individual complaint procedure as a strong enforcement mechanism. If the individual complaint mechanism poses no credible threat, then states can commit without having to concern themselves with their ability to comply – meaning that the state's level of human rights practices need not be figured into the ratification calculation. After all, the committees to whom these

¹⁴² Cole tested the influence of enforcement mechanisms on ratification decisions, but only as to the ICCPR, the ICESCR, and the ICCPR Optional Protocol. He found that a state's level of human rights ratings did not predict ratification of the ICCPR (even as to Article 41 which allows state complaints) or the ICESCR. However, states with better human rights ratings were more likely to join the optional protocol – a fact which he attributed to the differing enforcement mechanisms between the main treaties and the optional protocol. "Sovereignty Relinquished?," 485.

individual complaints are referred do not have the ability to issue legally binding decisions. Their powers are limited to persuading states to adopt their views and recommended remedies. Furthermore, there is evidence that at least with regard to the CERD and the CEDAW, the individual complaint procedure mechanism is of little significance in practice. Jack Donnelly characterizes the procedure for considering individual complaints under the CERD as “largely moribund.” The CEDAW committee has only issued a handful of decisions under the individual complaint procedure since it was empowered to consider such complaints in 2000.¹⁴³

The null findings regarding the CAT Optional Protocol may be similarly explained. Compliance costs may not influence ratification of the CAT Optional Protocol simply because states do not view the treaty’s enforcement mechanism as a credible threat. Like the other committees, the committee overseeing that treaty is not empowered to act punitively or impose any sanctions for noncompliance. Furthermore, as Henry Steiner notes regarding the Human Rights Committee, it is unlikely to pose a great threat to states as it thus far is able to consider only a small number of communications,¹⁴⁴ most of its decisions receive little publicity or attention, and the suggested remedies – compensation, release of a prisoner, or changes to legislation – do not likely threaten state interests sufficiently.¹⁴⁵ Those same issues presumably prevail in connection with committees for each of the main international human rights treaties and affect how states view the enforcement mechanisms associated with treaty ratification.

¹⁴³ Donnelly, *International Human Rights*, 87. According to the CEDAW website, the Committee had only issued seven decisions as of October 2010. See <http://www2.ohchr.org/english/law/cedaw-one.htm>.

¹⁴⁴ The most recent report of the Human Rights Committee indicated that it had issued 46 decisions (and declared 29 cases inadmissible) between October 2008 and July 2009. See Report of the Human Rights Committee, Volume I, Ninety-fourth session (13-31 October 2008), Ninety-fifth session (16 March-3 April 2009), Ninety-sixth session (13-31 July 2009) A/64/40 (2009).

¹⁴⁵ Steiner, “Individual Claims in a World of Massive Violations,” 36-37.

CHAPTER FIVE

AN INTRODUCTION TO THE CASE STUDIES

The quantitative chapters produced evidence supportive of the explanatory power of the credible threat theory. The results of the empirical analyses showed that in the case of the ICC – a treaty with relatively strong enforcement mechanisms – states are more likely to commit where retrospective calculations about their ability to comply with treaty terms indicates that commitment will impose only minimal sovereignty costs. Results showed that states with better human rights practices were significantly more likely than states with worse practices to readily ratify the ICC treaty. However, that same phenomenon was absent where the treaties at issue contained weaker enforcement mechanisms. The results of the event history analysis conducted in Chapter Four demonstrated that where enforcement mechanisms were weak, the level of a state’s human rights practices – the main indicator of its likely ability to comply with the norms advanced by an international human rights treaty – did not significantly influence ratification behavior. Rather, the results were generally consistent with other previous research which has found that states with poor human rights practices are just as likely as states with good practices to ratify international human rights treaties – the likely reason being that because enforcement mechanisms are weak, states can commit without any concomitant risks that they will be punished for noncompliant behavior. Therefore, they can ratify treaties designed to promote and protect human rights without any intention of complying because the potential intangible and indirect benefits of appearing to be a legitimate state that embraces human rights norms outweighs the costs associated with failing to comply with treaty terms.

The Goals of the Qualitative Analyses

While the quantitative analyses provided important tests of the explanatory power of the

credible threat theory and produced useful information regarding the reasons why states on the whole committed or refused to commit to the ICC, qualitative case study analysis better enables researchers to trace the processes through which states make those ratification decisions. As Alexander George and Andrew Bennett note, case studies permit a researcher to closely examine the role of causal mechanisms in the context of individual cases and also allow an examination of causal complexity.¹⁴⁶ In this particular instance, case study analysis will enable further exploration of states' ratification behavior – the complexity of which cannot be explored through quantitative analysis alone. Simply put, the qualitative analyses can move beyond the quantitative analyses which relied only on the treaty text and periodic data about states' domestic behavior and institutions to examine ICC ratification behavior. The case studies are not so constrained, and by closely tracing state ratification behavior over many years, those studies will allow us to examine additional state behavior relevant to a state's decision about whether and when to commit to the ICC treaty.

Here, because the ratification decision is necessarily dynamic and complex, I specifically explore several observable implications of the credible threat theory in an effort to further test the theory's explanatory power. First, one observable implication of the credible threat theory is that a state's perspective regarding ratification of the ICC may change over time as its own domestic behavior and institutions change. More specifically, if states are concerned with the compliance costs associated with the Rome Statute's relatively strong enforcement mechanisms, states should be more likely to ratify if and when their domestic human rights behavior becomes good and/or their domestic law enforcement institutions become more independent and capable of prosecuting any mass atrocities should they occur. The corollary is, over time, that if there are

¹⁴⁶ Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: Belfer Center for Science and International Affairs, 2005), 19.

negative changes in either the state's human rights practices or the independence and capability of its law enforcement institutions, the state will avoid or renege on ICC commitment.

Second, although the results of the empirical analyses indicated that cost of compliance calculations did influence ICC ratification behavior, the qualitative analyses will permit a more complete exploration of those calculations and any trade-offs states make when considering commitment. The case study analysis also allows for a comparison between the credible threat theory and the other rationalist and normative theories which predict that states' ratification behavior will be influenced by other costs unrelated to treaty terms and/or by potential intangible or indirect benefits. If the credible treat theory is correct, we should see that states' calculations about their ability to comply with ICC treaty terms play the most significant role in their ratification behavior – even if they are also influenced by other costs or potential indirect benefits.

Finally, if states view the ICC's enforcement mechanisms as a credible threat, states should be concerned with their ability to comply with the ICC treaty's terms both before and after ratification. Even a state with good human rights practices should want to insure that those practices remain good after ratification so that the state and its citizens do not become the subject of an ICC investigation and prosecution. Similarly, those same states should also want to ensure that their institutions and laws are sufficient to prosecute any crimes that may come within the ICC's jurisdiction to further protect against a costly loss of sovereignty – even if those states generally expect their leaders and citizens will not commit the kinds of mass atrocities covered by the Rome Statute. In short, if the credible threat theory is correct, we should see continued efforts by states to remain in compliance with the terms of the Rome Statute.

Qualitative case study analyses can ascertain the general pattern uncovered by the

quantitative analysis, but they also allow for a test and exploration of these additional implications. Below, I explain how Germany, Trinidad and Tobago, Rwanda, and Kenya were selected for case study analysis.

The Logic of Case Selection

Case selection of the countries for in-depth study was driven by theory, and therefore, by the values on the main explanatory variables of interest – a state’s level of human rights practices and the level and quality of its domestic law enforcement institutions. In addition, because the credible threat theory predicts differing ICC ratification behavior depending on whether the state had better or worse human rights practices, states with both high and low physical integrity rights ratings were included. Furthermore, because, as the evidence from earlier chapters demonstrated, states with poor human rights practices have joined the ICC notwithstanding that ratification is inconsistent with the credible threat theory, the case studies include a state that acted contrary to theoretical predictions. Table 15 lists the states that were selected.

Table 15: States Selected for Case Studies Based on ICC State Commitment Decisions Expectations

	Low Likelihood of Human Rights Violation	High Likelihood of Human Rights Violation
Worse Domestic Law Enforcement Institutions	Trinidad and Tobago: Consistent with prediction, ratified ICC treaty	Rwanda: Consistent with prediction, did not ratify ICC treaty Kenya: Contrary to prediction, did ratify ICC treaty
Better Domestic Law Enforcement Institutions	Germany: Consistent with prediction, ratified ICC treaty	Refuse to commit to the ICC (since can’t control ICC determinations about the quality of domestic prosecutions) [but theoretically unlikely many states in this category]

I discuss below how each of these countries was chosen from amongst the others within these several categories: (1) states with very good human rights practices and domestic law enforcement institutions; (2) states with very good human rights practices, but worse domestic law enforcement institutions; and (3) states with very bad human rights practices and domestic law enforcement institutions.

States with Very Good Human Rights Practices and Domestic Law Enforcement Institutions

The table below lists states which the data indicated had both very good human rights practices and very good domestic law enforcement institutions and from which I selected Germany for an in-depth case study.

Table 16: States with Very Good Human Rights Practices and Domestic Law Enforcement Institutions¹⁴⁷

Ratified		Not Ratified
Andorra (2001)	Norway (2000)	Bahamas
Australia (2002)	Spain (2000) ¹⁴⁸	Singapore
Austria (2000)	Sweden (2001)	Tuvalu
Barbados (2002)	Switzerland (2001)	
Belgium (2000)	United Kingdom	
Canada (2000)	(2001)	
Denmark (2001)		
Finland (2000)		
France (2000)		
Germany (2000)		
Iceland (2000)		
Ireland (2002)		
Japan (2007)		
Liechtenstein (2001)		
Luxembourg (2000)		
Malta (2002)		
Netherlands (2001)		
New Zealand (2000)		

¹⁴⁷ The states included in this table all had average physical integrity rights ratings of greater than 6 and rule of law ratings of greater than 1. Averages were based on data between 1996 and 2008 as they were in Chapter Three.

¹⁴⁸ Dates in parentheses show the year the state ratified the Rome Statute.

This category includes only those states with average physical integrity rights ratings of greater than 6 and average rule of law ratings of greater than 1 – therefore, states with the very best practices and institutions.¹⁴⁹ Examining the ratification behavior of a state with high levels on both of the main explanatory variables is crucial to testing the credible threat theory and to understanding more precisely why and how states that are more likely able to comply with the ICC treaty proceed to ratification. In addition, conducting case study analysis on a state within this category is also crucial for understanding the import of the ICC’s enforcement mechanism and whether states actually view it as a credible threat.

I selected Germany for case study analysis from amongst the 23 states with the best human rights practices and best domestic law enforcement practices for several reasons related to improving the ability to test the explanatory power of the credible threat theory. Indeed, as George and Bennett explain, choosing cases based on some preliminary knowledge about them can be both necessary and beneficial since it allows selecting cases with a view towards making the process tracing of a theory more severe.¹⁵⁰ Here, I chose to study a European country since so many of the States Parties to the ICC are European.¹⁵¹ In addition, I concluded that focusing on a richer and powerful state would be useful since it would assist in ruling out other theories about normative and other pressures that might help explain the ratification behavior of smaller and weaker states that depend on others for trade, aid, or military support. Not only does ruling out those “pressure” explanations help isolate the credible threat theory, but focusing on more powerful and richer states provides a tougher test of the credible threat theory since those states

¹⁴⁹ Indeed, as the empirical analyses and Table 16 demonstrate, almost all states in this category ratified the ICC treaty as predicted by the credible threat theory. Thus, this category of states did not provide a fruitful avenue for an atheoretical case study as does the category of states with the poorest human rights practices and poorest domestic law enforcement institutions.

¹⁵⁰ George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 24.

¹⁵¹ Figure 2 in Chapter Three shows ICC treaty ratification by region.

should be better able to make their own ratification decisions without interference.

Finally, as compared to the other richer and more powerful states within Europe – such as France and the United Kingdom – Germany should again provide the tougher test of the credible threat theory since it has a genocidal past and also a history of poor human rights practices and a lack of respect for the rule of law. Because of that past and the fact that Germany did not embrace the Nuremburg trials and the resulting infringement on its sovereignty, one could reasonably wonder whether Germany would choose to join an organization like the ICC with its relatively strong enforcement mechanisms. True, some might argue that Germany is an easy case since it would necessarily feel a need to join the ICC so as to signal to the world and to the rest of Europe that it was putting its past behind it and was committed to being a state that protected against human rights abuses. But, Germany did not just commit to the court, and it certainly did not do so because of any implied or express pressure from others. Germany arguably went well beyond what it might have been required to do in order to show it was committed to changing its ways – particularly given that it is a rich and powerful state that does not have to depend on other states for its existence and survival.

In terms of the observable implications outlined in the introductory section above, if the credible threat theory is correct, we should see evidence that Germany committed to the court at a time when costs of compliance and threats to its sovereignty would be minimal. In addition, we should see evidence that cost calculations played a primary role in Germany's ratification behavior – even if, for example, there is other evidence that Germany also believed that it could obtain some uncertain and indirect benefits from committing to the court. Finally, if Germany does view the ICC treaty's enforcement mechanisms as a credible threat, we should see continued efforts by Germany to comply with the court even after ratification and even if at the

time of ratification its human rights practices were sufficiently good to likely insure that it would not be the subject of an ICC investigation and prosecution.

States with Very Good Human Rights Practices, but Worse Domestic Law Enforcement Institutions

The table below lists states which the data indicated had very good human rights practices, but worse domestic law enforcement institutions and from which I selected Trinidad and Tobago for an in-depth case study.

Table 17: Very Good Human Rights Practices, but Worse Domestic Law Enforcement Institutions¹⁵²

Ratified		Not Ratified
Antigua (2001)	Nauru (2001)	Brunei
Belize (2000)	Panama (2002)	Cape Verde
Benin (2002)	Poland (2001)	Grenada
Bosnia (2002)	Samoa (2002)	Monaco
Botswana (2000)	San Marino (1999)	Oman Solomon
Comoros (2006)	Serbia (2001)	Islands
Costa Rica (2001)	Slovak Republic	Palau
Croatia (2001)	(2002)	Qatar
Cyprus (2002)	Slovenia (2001)	Sao Tome
Czech Republic (2009)	St. Lucia (2010)	Taiwan
Djibouti (2002)	St. Vincent (2002)	Tonga Micronesia
Dominica (2001)	Trinidad and	United Arab
Estonia (2002)	Tobago (1999)	Emirates
Fiji (1999)	Uruguay (2002)	Vanuatu
Gabon (2000)		
Greece (2002)		
Hungary (2001)		
Italy (1999)		
Latvia (2002)		
Lesotho (2000)		
Lithuania (2003)		
Mali (2000)		
Marshall Islands (2000)		
Mauritius (2002)		
Montenegro (2006)		

¹⁵² The states included in this table all had average physical integrity rights ratings of greater than 6 and rule of law ratings of between 1 and -1.

As above, I restricted this category to states with average physical integrity rights ratings of greater than 6 so as to capture those states with the best human rights practices. In order to further test the credible threat theory and the potential independent influence of the state's level of domestic law enforcement institutions on ratification behavior, however, this category of states includes those with lower rule of law ratings – between 1 and -1. Case study analysis of Trinidad and Tobago's pre- and post-ratification behavior should provide insights into why a state with relatively good human rights practices, but relatively average, weak, or incapable domestic law enforcement institutions, nevertheless joins the ICC. This case study is particularly relevant given that the empirical results showed it was only a state's human rights ratings – and not its rule of law ratings – that were a significant and positive predictor of ratification. Thus, even though there are two prongs to ICC compliance (and which allow a state to avoid a loss of sovereignty to the ICC), where the state does not expect its citizens will not perpetrate mass atrocities, it may still view compliance costs as minimal and nevertheless commit to the court.

I chose Trinidad and Tobago to study from amongst the other 37 states that acted as predicted by the credible threat theory and ratified the ICC for several reasons.¹⁵³ First, I excluded from consideration the various weaker and/or poorer Western or Eastern European states because the European Union strongly supported the court and because such states would likely have felt pressure to join as a result. Thus, I wanted to eliminate this confounding explanation for state ratification behavior. Nevertheless, by choosing Trinidad and Tobago for case study analysis, I still preserved the opportunity to examine and compare the explanatory power of normative and other theories with the explanatory power of the credible threat theory. Trinidad and Tobago is a small and relatively weak state, thus its ratification behavior can be

¹⁵³ It bears noting that about 11 of the states among those 37 did not have data for all years on my main explanatory variables and were otherwise small states for which not all data on all variables was reported. I accordingly decided to eliminate them as choices.

tested against theories about pressure. In addition, however, Trinidad and Tobago did play a role in the creation of the court and ratified the ICC treaty very promptly. Therefore, studying its ICC ratification behavior provides a tough test of the credible threat theory since it allows for a comparison against the explanatory power of normative theories. In short, as I selected Germany, I selected Trinidad and Tobago for case study analysis because the small amount of preliminary information available indicated that the country would provide a good and tough test of the credible threat theory.

In terms of observable implications, if the credible threat theory is correct, as in the case of Germany, we should see evidence that Trinidad and Tobago committed to the court at a time when costs of compliance and threats to its sovereignty would be minimal. In addition, we should see evidence that cost calculations played a primary role in Trinidad and Tobago's ratification decision. Indeed, because Trinidad and Tobago is a smaller and weaker state, the case study analysis will offer an opportunity to expressly compare the explanatory power of the credible threat theory to theories about normative pressure. If the credible threat theory is correct, Trinidad and Tobago's ratification decision should be premised on compliance cost calculations, even if there is also evidence of normative pressures. Finally, as with Germany, we should see continued efforts by Trinidad and Tobago to comply with the court even after ratification – which evidence would lend additional support to the idea that the country views the ICC's enforcement mechanisms as a credible threat and wants to comply with treaty terms in order to avoid a costly loss of sovereignty.

States with Very Bad Human Rights Practices and Domestic Law Enforcement Institutions

Because the ratification behavior of states with bad human rights practices is of particular interest given the credible threat theory which predicts that such states will be wary of

committing to the ICC and its relatively strong enforcement mechanisms, within this category of states, I chose to conduct two case studies. From amongst the states listed in Table 18 which all have very bad human rights practices and domestic law enforcement institutions, I chose to study Rwanda because its decision to refuse to ratify the Rome Statute is consistent with the credible threat theory. But, so as to further explore the explanatory power of the credible threat theory – and to further explore the potential explanatory power of the credible commitment theory – I also chose Kenya as a case to study because its decision to ratify the ICC treaty in 2005 demonstrates behavior seemingly inconsistent with that predicted by credible threat theory.

Table 18: Very Bad Human Rights Practices and Domestic Law Enforcement Institutions¹⁵⁴

Ratified	Not Ratified
Burundi (2004)	North Korea
Democratic Republic of Congo (2002)	Iraq
Afghanistan (2003)	Sudan
Nigeria (2001)	Burma
Chad (2006)	Angola
Kenya (2005)	Ivory Coast
Liberia (2004)	Uzbekistan
	Cameroon
	Rwanda
	Yemen

I restricted this category to states with average physical integrity rights ratings of lower than 3 –states which the credible threat theory predicts would be least likely to ratify the ICC treaty. Examining the ratification behavior of a state with low levels on both of the main explanatory variables is critical to testing the explanatory power of the credible threat theory and to understanding more precisely the behavior of states that are likely least able to comply with

¹⁵⁴ The states included in this table all had average physical integrity rights ratings of less than 3 and rule of law ratings of below -1.

ICC treaty terms. Indeed, examining the ratification behavior of a state like Kenya is particularly important to understanding the explanatory power of the credible threat theory. For example, the Kenya case study can shed light on how states with poor practices view the ICC's enforcement mechanisms, whether their decision to commit is premised on some ability or intention to better their practices, and whether the ICC's enforcement mechanisms are able to influence state behavior post-commitment.

As to the reasons for choosing Rwanda and Kenya for case study analysis, several considerations were paramount. First, choosing two countries from the same region seemed warranted so as to eliminate a difference in region or culture from the explanations about the differing commitment behavior. It also made sense to choose states from Africa since African states are a large part of the ICC's constituency. Second, both Rwanda and Kenya have similar average physical integrity rights and rule of law ratings. Both countries have average physical integrity rights ratings of about 2.7 and average rule of law ratings of about -1. Finally, as to Rwanda in particular, it has a recent genocidal history which allows for a nice juxtaposition against the German case study – although, of course, the Rwandan genocide occurred much more recently than did the German genocide.

In terms of observable implications, because both states have poor human rights practices and poor domestic law enforcement institutions, we should see evidence that the states refrain from ratifying the ICC treaty because costs of complying with treaty terms are significant and will pose risks to state sovereignty. We should also see evidence that the states place considerations about the costs of compliance above any considerations about potential intangible or indirect benefits that might be obtained from joining the court – inasmuch as a failure to comply could prove costly from a sovereignty standpoint. Furthermore, in terms of comparing

the explanatory power of the credible threat theory to that of the credible commitment theory, we should see that these states do not commit to the ICC, or if they do commit, that they do not commit in order to tie their hands and demonstrate to their domestic audience that they will not resort to violence and will also end the cycle of impunity.

Of course, Kenya was chosen for study precisely because it acted contrary to the predictions of the credible threat theory and ratified the Rome Statute in 2005 even though at that time, it still had bad human rights practices and weak domestic law enforcement institutions. But, again, the case study allows us to closely examine Kenya's behavior both before and after ratification in an effort to determine the country's reasons for ratification. Thus, we can look before and after ratification for any evidence that Kenya was concerned with the costs of complying with the ICC treaty's relatively strong enforcement mechanisms. In addition, because Kenya did commit to the Rome Statute in 2005, we can look for evidence consistent with the credible commitment theory. If the credible commitment theory is correct, we should see evidence that after 2005, Kenya embraced the ICC's relatively strong enforcement mechanisms and used them to tie its leaders' hands. For example, we should see an absence of government-instigated violence. Or, if there is government-instigated violence post-ratification, we should see evidence that the government is using the ICC's strong enforcement mechanisms as a tool for aiding the government in ending any prior cycle of impunity. On the other hand, if the credible threat theory is correct, post-ratification, we should see evidence that the Kenyan government is making efforts to ensure that it can comply with the ICC treaty so as to avoid a costly loss of sovereignty. In the event of noncompliance, however, unlike the credible commitment theory which predicts that the state will embrace the ICC treaty's relatively strong enforcement mechanisms, the credible threat theory predicts that the state will prefer to avoid restraints on its

sovereign power to do as it pleases and seek to avoid any costly commitments.

The Uniqueness of the United States Regarding the ICC

Of course, time and space only permit a limited number of case studies. But, because the notable absence of the United States amongst the list of ICC States Parties may cause some readers to be concerned that it provides a tough test of the credible threat theory that is being ignored, I here address my decision not to select it for case study analysis. Although the specific reasons for its exclusion are addressed below, as an initial matter, I suggest that the United States would not necessarily serve as a good case study because its behavior may not be very helpful for understanding the behavior of other countries vis-à-vis ICC ratification. After all, the United States' unique situation as a superpower means that it is different from every other state in terms of the power it wields. And, by virtue of that power, the United States tends to also behave somewhat uniquely in terms of the commitment decisions it makes to international human rights treaties.

More specifically, the United States was not chosen for case study analysis here because as can be seen from a review of the tables above, the United States' values on the two main explanatory variables do not put it into any of the categories most relevant to testing the explanatory power of the credible threat theory. And, while one might expect that the United States would be listed as a state with the best human rights practices and best domestic law enforcement institutions, its recent ratings on the physical integrity rights scale have been somewhat poor. The average physical integrity rights rating for the United States is below 6, and in the years 2004 through 2006, it scored only 4 on that scale. Therefore, although the United States' human rights practices may not be bad on the whole, the fact that it has scored poor human rights ratings actually makes its failure to commit to the ICC somewhat consistent with

the credible threat theory. Indeed, consistent with the United States' role as a superpower, the United States has a large military presence internationally. And, as is well-known, its soldiers have been accused of committing acts that some suggest constitute torture. Accordingly, the United States may have reasons to conclude that the costs of committing to the ICC and its relatively strong enforcement mechanisms pose a significant risk to its sovereignty that it is unwilling to accept.

Of course, the United States does have very good independent and capable domestic law enforcement institutions with which it could punish offenders – a fact which should lessen any of its concerns about compliance costs and risks to its sovereignty should it join the court. But, under the ICC's system of complementarity, the ICC prosecutor and court make the final determination about whether a state's domestic processes have been sufficient for it to avoid ICC jurisdiction over the matter. Thus, if the United States concludes that particular conduct does not warrant prosecution, it could still risk its citizens being prosecuted by the ICC. And, the United States is not just any state. It has argued that its status as a superpower, and the fact that it has taken military actions abroad with which other states have not agreed, put it in a situation where it could be subjected to “unfounded charges” and “politicized prosecutions.”¹⁵⁵ As Ruth Wedgwood states, “The worry of the United States is that in an unpopular conflict, there is a real chance that an adversary or critic will choose to misuse the ICC to make its point.” As she further notes, “The role of the United States in balance of power structures in Asia and Europe, and in support of transcontinental peacekeeping and peace enforcement operations, together with the deployment of 200,000 American troops abroad, may leave the United States in a unique

¹⁵⁵ Statement by President Clinton: Signature of the International Criminal Court Treaty (Dec. 31, 2000), available at http://clinton4.nara.gov/textonly/library/hot_releases/December_31_2000.html. For a good discussion of the similar objections about a politicized court that the United States raised in connection with the International Court of Justice, see Struett, *The Politics of Constructing an International Criminal Court*, 68.

position in regard to the Court.”¹⁵⁶

Second, even if the United States’ values on the main exploratory values had been high enough to make it a good atheoretical test of the credible threat theory since it did not ratify the Rome Statute, it still would be a poor choice for a case study since its behavior vis-à-vis international human rights treaties is rather unusual for a state with relatively good human rights practices. Specifically, because the United States behaves rather uniquely with respect to its ratification behavior (and because, as noted above, it is rather unique in its military situation), it would not make a good case study with outcomes that could be generalized at all beyond the one case. As shown in Table 19 below, the United States has not even ratified all of the main international human rights treaties with the weakest enforcement mechanisms. Not only is this behavior somewhat singular amongst countries with good human rights practices, it is unique even amongst states with bad human rights practices. For example, 160 states have ratified the ICESCR; 185 have ratified the CEDAW; and 193 have ratified the CRC. In addition, even as to the three other main treaties which it did ratify, the United States only did so recently. Furthermore, while it is true that the United States did ratify the two treaties which allow for state complaints, again, it did not do so promptly – and perhaps only after it had learned that the mechanism was not being used.¹⁵⁷

¹⁵⁶ Ruth Wedgewood, “The International Criminal Court: An American View,” 102-02.

¹⁵⁷ In fact, the United States did not even ratify the Genocide Convention until 1986, and its reservations seek to eliminate the possibility that United States citizens would be tried before an international court. Struett, *The Politics of Constructing the International Criminal Court*, 69.

Table 19: Commitment to the Six Primary International Human Rights Treaties

Treaty	Enforcement Mechanism	Date Open	Ratification Date
ICCPR	Reports	1966	1992
ICESCR	Reports	1966	--
CERD	Reports	1966	1994
CEDAW	Reports	1980	--
CAT	Reports	1984	1994
CRC	Reports	1989	--
ICCPR Art. 41	State Complaints	1966	1992
CAT Art. 21	State Complaints	1984	1994
ICCPR Opt.	Individual Complaints	1966	--
CERD 14	Individual Complaints	1966	--
CAT 22	Individual Complaints	1984	--
CEDAW Opt.	Individual Complaints	1999	--
CAT Opt.	Committee Visits	2003	--

That the United States did not ratify the totality of these international human rights treaties, however, does not mean that it does not support human rights or is not committed to the idea of bringing international criminals to justice. After all, it champions global human rights, and it provides peacekeepers and conducts military interventions to aid in situations where human rights are being abused. It also took the lead in Nuremburg and has supported the various ad hoc international criminal tribunals. Furthermore, although its human rights ratings of late have not been the highest – likely because of actions committed by military personnel – the United States is not a country one would expect to experience a genocidal episode or other types of government-sponsored mass atrocities. Moreover, its domestic law enforcement institutions are of very high quality. Therefore, even though some of its human rights practices may at times be questionable or not what one would expect of a leader, the United States is not one of the states that the international community might most need to have bound to ICC treaty terms since the treaty is focused on punishing and deterring those most responsible for perpetrating the very

gravest atrocities.

Rather, what the evidence shows is that the United States guards its sovereignty very closely and also prefers to have some control over the international institutions in which it participates. Its conduct in connection with the ICC negotiations is only further proof of this point. The United States participated in the negotiations leading to the creation of the ICC, but it supported a court more like the one envisioned in the 1994 ILC draft where states – and particularly, powerful states – had more control over what cases would come under the court’s jurisdiction. Under the proposals supported by the United States, the Security Council would have veto power over the commencement of ICC investigations, which given the United States’ role as a permanent member meant that it would have had some control over the ICC docket.¹⁵⁸ In addition, under the United States’ proposals, the prosecutor would not have had any powers to mount investigations on his own authority.¹⁵⁹ When the remaining states instead decided to create a strong and independent court, the United States declined to vote for the adoption of the Rome Statute.¹⁶⁰

Conclusion

In conclusion, as the figures below further demonstrate, the four cases selected for study demonstrate variance on the dependent variable of ICC commitment and also on the main independent variables of interest: a state’s level of human rights practices and its level of

¹⁵⁸ Megan A. Fairlie, “The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage,” forthcoming *Berkeley Journal of International Law* (2011): 8.

¹⁵⁹ *Ibid.*

¹⁶⁰ In fact, David Scheffer, the United States ambassador-at-large for war crimes issues who also served as the head of the American delegation at the Rome Conference explained the United States’ failure to vote for adoption of the statute as follows: “There were a few very fundamental issues which either have to be accommodated within the treaty text or they present very severe difficulties for the United States government. . . . accommodations were not achieved in the negotiations, and therefore we were not in a position to support the text as it came out of Rome.” On the Record Briefing at Foreign Press Center, Federal Document Clearing House, July 31, 1998, available at 1998 WL 431804.

domestic law enforcement institutions. In addition, the cases for individual study both fit and do not fit my theoretical expectations.

Figure 6: Case Study States Human Rights Ratings by Year

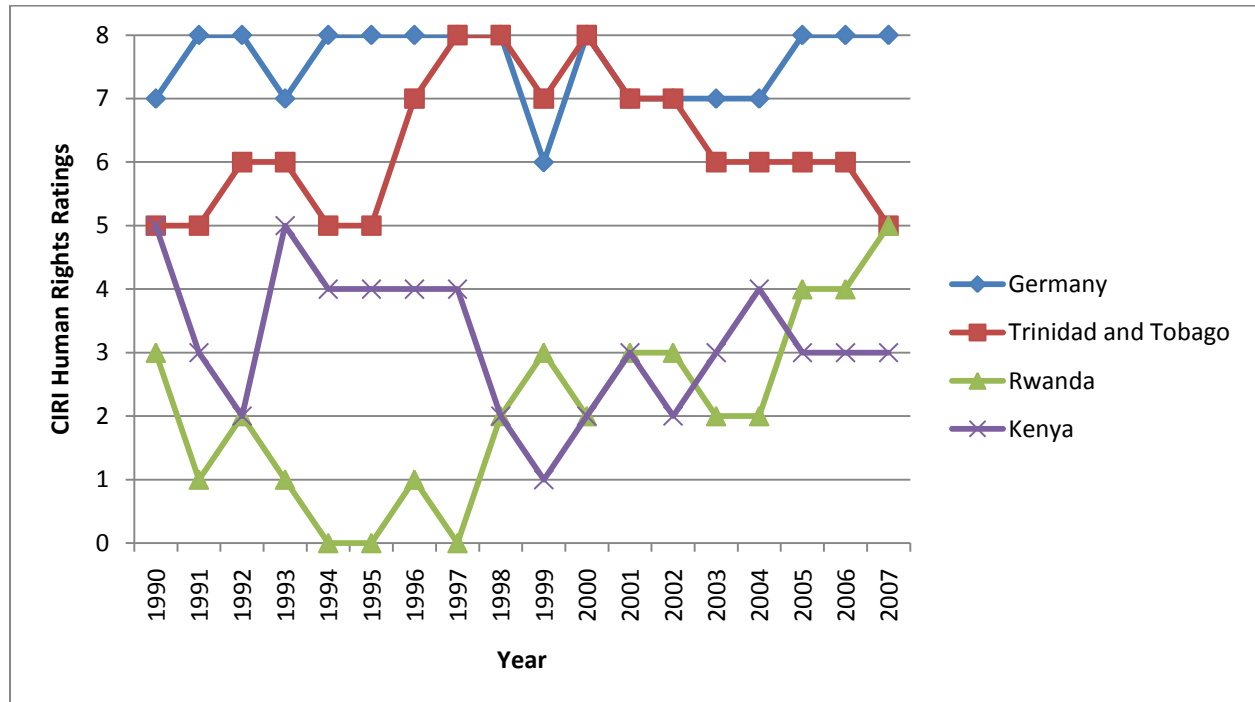
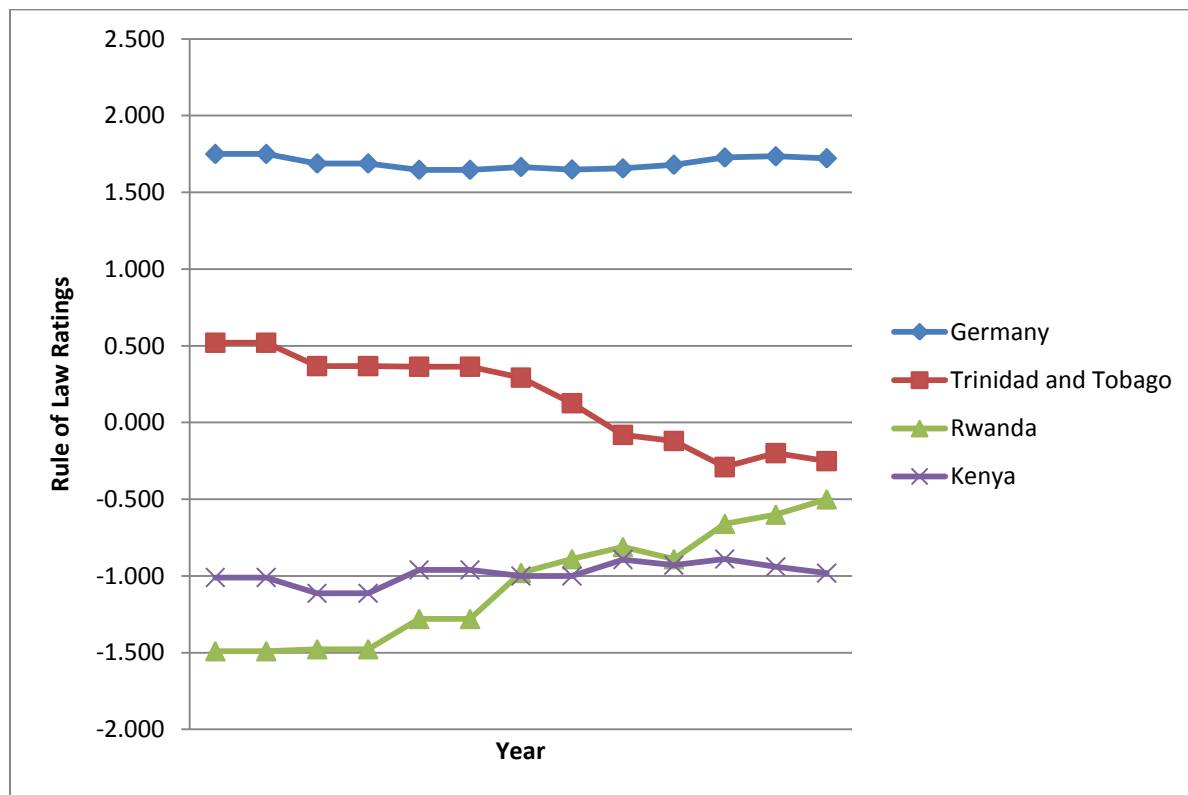


Figure 7: Case Study States' Rule of Law Ratings from 1996 to 2008¹⁶¹



In-depth examination of these diverse cases should add depth and understanding to the empirical findings: we can now test the explanatory power of the credible threat theory in a range of contexts, test observable implications of that theory, and also compare the explanatory power of that theory to others, including the credible commitment theory.

¹⁶¹ World Bank Rule of Law ratings are only available beginning in 1996.

CHAPTER SIX

GERMANY: AN INTERNATIONAL CRIMINAL LAW CONVERT

This chapter examines Germany's decision to ratify the ICC in historical and political context. Germany was an early leader in the push for a strong and independent permanent international criminal court aimed at ending impunity for mass atrocities. It was deeply involved in negotiations culminating in the adoption of the ICC treaty, and it presented and argued for proposals that would give the prosecutor and the court significant powers to investigate and prosecute mass atrocities. Furthermore, after negotiations, Germany promptly committed to the ICC. It signed the treaty creating the court on December 10, 1998, approximately five months after the Rome Statute was available for signature. Thereafter, on December 11, 2000, which it emphasized was also the 52nd anniversary of the Universal Declaration of Human Rights, Germany became the twenty-fifth state to ratify the ICC treaty. In the press release announcing Germany's decision to join the court, Hans-Peter Kaul, the German representative (and now an ICC judge), noted that all members of the German parliament had unanimously voted for ratification. He further stated that Germany was in the process of amending its own constitution (the "Basic Law") in order to allow for the surrender of German nationals to the ICC.¹⁶²

Of course, because Germany presently enjoys high human rights ratings and strong domestic law enforcement institutions, its decision to readily ratify the Rome Statute is in many ways not surprising. In addition, because Germany has good human rights ratings and no recent history of government-sponsored violence, this case study does not present questions about whether Germany committed to the ICC in order to credibly commit to its domestic audience to act non-violently and enforce the rule of law. From the mid-1990s to the present (in all but one

¹⁶² UN Press Release, "South Africa, Germany Announce Ratification Of Statute To Establish International Criminal Court," Nov. 27, 2000. UN Press Releases are available at <http://www.un.org/News/Press>, accessed September 2010.

year), Germany has scored a seven or eight on the physical integrity rights scale – which ranges from 0 to 8 and is based on Amnesty International and United States State Department reports. Its rule of law ratings (used as a proxy for the strength of a state's domestic law enforcement institutions and its ability to prosecute any mass atrocities) are also consistently among the best. For the period from 1995 to 2008, Germany has received a score of approximately 1.7 – where the very highest score in the sample provided is about 2.1. Finally, in terms of its democracy rating, Germany has scored 10 out of a possible 10 points from 1995 forward. Thus, the data suggest that Germany should suffer minimal compliance costs by joining the court – even if the enforcement mechanisms contained in the ICC treaty are as strong in practice as they appear to be on paper.

Nevertheless, as the case study shows, that Germany would be a leader in pushing for a strong and independent ICC and promptly commit to an international court that could infringe on Germany's sovereignty was anything but a foregone conclusion. Germany was responsible for one of the most horrendous genocides in recent history. In addition, for decades thereafter, Germany denounced the international community's efforts to hold it and its soldiers accountable for the atrocities they had committed. Indeed, when Germany had poor human rights practices, it was very hostile to the idea of punishment and a role for the world community in implementing that punishment, and it avoided international human rights treaties with stronger enforcement mechanisms.

But, in about the 1990s, with generational change, Germany's attitudes towards human rights began to improve, as did its respect for the rule of law. And, those changes had implications regarding Germany's behavior in committing to international human rights treaties – implications which also provide support for the power of the credible threat theory to explain

Germany's decision to promptly commit to the ICC. Specifically, it was only after Germany's human rights practices and the quality of its domestic law enforcement institutions improved that Germany showed an interest in committing to international human rights treaties with stronger enforcement mechanisms. Similarly, Germany only committed to the Rome Statute and its strong enforcement mechanisms after ensuring that it would be able to comply with treaty terms and would not suffer a loss of sovereignty by having its citizens prosecuted in The Hague. In fact, Germany's concern for compliance was so strong that it amended its constitution and laws to ensure they were consistent with the Rome Statute requirements.

This chapter is organized as follows. I begin by discussing Germany's human rights practices in the historical context of World War I and World War II, including the efforts made at those times to hold Germans accountable for committing war crimes and other crimes against humanity. I then examine the evolution of Germany's behavior and attitudes relating to its respect for the protection of human rights from the post-World War II period until reunification in the 1990s. Next, I trace Germany's role in the creation of a permanent international criminal court. I follow by looking at Germany's decision to join the court and the actions it has taken to comply with the court before and after ratification. I particularly focus on the domestic laws Germany has enacted to implement the provisions of the Rome Statute and to allow German cooperation with the court. I conclude that while Germany's process in becoming a state with good human rights practices and good institutions is certainly unique, the credible threat theory and a rational concern for compliance with treaty terms best explains Germany's commitment to the ICC.

Background: The Shameful Past

It is a significant understatement to say that Germany has not always demonstrated good

human rights practices or supported the idea that abusers of human rights must be brought to justice. On the contrary, beginning with World War I and continuing through the end of World War II, Germany, its leaders, and its citizens committed mass atrocities of the most heinous nature. Furthermore, efforts by the world community – particularly by the Allied governments that finally managed to defeat Germany in those wars – to convince Germany that those who committed the atrocities must be punished were generally ignored. Not only did Germany resist trials of its nationals for crimes committed during the world wars, but also, it and its people denied that trials commenced by the victors were proper, fair, or warranted. Rather, Germany held fast to the idea that it had the sovereign right to conduct its internal domestic affairs as it saw fit, even if the manner in which it conducted those affairs included exterminating whole populations of its citizenry.

Germany's Human Rights Violations during World War I and the Failed Attempts to Hold Violators Accountable

The conclusion of World War I marked the first effort of the world community to hold Germans accountable for mass atrocities. From the very beginning of that war, the Allies (Great Britain, France, and Russia) were upset by the cruel and inhumane way Germans conducted themselves. Between August and October 1914, German soldiers massacred some 6,500 French and Belgian citizens and destroyed more than twenty thousand buildings. Germans also deported French and Belgian citizens to forced labor camps.¹⁶³ Furthermore, German submarines attacked and sank neutral merchant ships and hospital ships. German troops also sank the *RMS Lusitania*, a passenger ship passing off the coast of Ireland, killing 1,198 people, including over 100

¹⁶³ Reginbogin, "Confronting 'Crimes Against Humanity' from Leipzig to the Nuremberg Trials," 119.

Americans.¹⁶⁴ France accused the Germans of mistreating – including killing – prisoners of war and of raping and pillaging in the French villages its soldiers occupied.¹⁶⁵ Great Britain was particularly angered when Germans executed a British nurse for sheltering Allied soldiers in Belgium.¹⁶⁶

Given these acts by Germany and its soldiers, as early as 1915, Great Britain made holding the Germans accountable for war crimes part of its stated goals in the event that the Allies were victorious.¹⁶⁷ At the conclusion of the war, and by the Treaty of Versailles, Great Britain embarked on that goal. Among other things, the treaty provided for the creation of a multinational special tribunal to try Germany's head of state, Kaiser Wilhelm II, for committing "a supreme offence against international morality and the sanctity of treaties."¹⁶⁸ In addition, by Articles 228 and 229 of the Treaty of Versailles, Germany purportedly also recognized the Allies' right to try its citizens for war crimes and agreed to surrender to them all accused persons to military tribunals of one or more of the Allied powers.¹⁶⁹

Implementing these provisions allowing for the trial of the German Kaiser and German soldiers, however, was anything but a success. Not only was there a lack of international cooperation and political will to try offenders, but also Germany guarded its sovereignty, and moreover, demonstrated by its conduct after the war that it did not believe the acts of its leaders or soldiers amounted to war crimes deserving of punishment. Germany believed it was being singled out unfairly for punishment based on acts that were similar to those that others had

¹⁶⁴ Gary Jonathan Bass, *Stay The Hand Of Vengeance: The Politics Of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 94-95.

¹⁶⁵ Bass, *Stay The Hand of Vengeance*, 81-83.

¹⁶⁶ *Ibid.* at 62.

¹⁶⁷ Reginbogin, "Confronting 'Crimes Against Humanity' from Leipzig to the Nuremberg Trials," 119.

¹⁶⁸ Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, Art. 227.

¹⁶⁹ Treaty of Versailles, June 28, 1919, Arts. 228 and 229

committed during the course of the war.¹⁷⁰

Not only were the Allies unable to prosecute the German Kaiser, but the efforts to try Germany's soldiers were also a great failure. The trial of Kaiser Wilhelm never happened because he sought and found asylum in the Netherlands, which thereafter refused to extradite him to stand trial. Nor did the Allies ever obtain the surrender of any German military personnel for war crimes trials. Although the Allies managed to trim the list of suspects they wished to try to about 890, even that list was met with shock and claims that the German people would not stand for having so many men turned over to the Allies for trial. Thereafter, the Allies began to retreat from their demands, and they eventually accepted a German compromise proposal which would allow the Germans themselves to try the accused before the German Supreme Court in Leipzig.¹⁷¹ But, of the initial 45 accused selected for trial in Leipzig in 1921, only 12 somewhat low-level perpetrators were tried, and six were acquitted.¹⁷² Furthermore, those who were convicted received relatively light sentences -- usually of some months in jail.¹⁷³ Finally, by 1922, the Allies were so discouraged by the conduct of the Leipzig trials -- believing them to be parody of justice¹⁷⁴-- that they essentially abandoned pressing forward on Article 228.¹⁷⁵

Moreover, although the Germans conducted a number of other trials in Leipzig between 1921 and 1927 of persons accused of having committed various forms of war crimes, those trials too were primarily seen as nothing but a parody of justice as they did little or nothing to convince the German people that Germans had, in fact, committed war crimes. Professor Herbert

¹⁷⁰ Bass, *Stay The Hand Of Vengeance*, 76; Reginbogin, "Confronting 'Crimes Against Humanity' from Leipzig to the Nuremberg Trials," 119-20.

¹⁷¹ Bass, *Stay The Hand Of Vengeance*, 78-80.

¹⁷² Cassese, *International Criminal Law*, 318.

¹⁷³ Bass, *Stay The Hand Of Vengeance*, 80-81; 88-90.

¹⁷⁴ French Prime Minister Briand called the Leipzig trials of Germans accused of committing war crimes against the French: "Comedy, scandal and parody of justice." Claus Kress "Germany and International Criminal Law: Continuity or Change?," in *The Nuremberg Trials: International Criminal Law Since 1945*, eds. Herbert R. Reginbogin and Christoph J. M. Safferling (Munich: K.G. Saur Verlag GmbH), 235.

¹⁷⁵ Bass, *Stay The Hand Of Vengeance*, 82.

Reginbogin explains that although some 1,700 different forms of trials were held dealing with murder, mistreatment of prisoners of war, submarine and air warfare, most resulted in acquittals. In fact, the judges typically found that the accused could not have been acting criminally inasmuch as their acts were taken in pursuit of a military goal, rather than with a single purpose to harm innocent others.¹⁷⁶ It is true that in one case – the *Llandovery Castle* case – a court did reject a defense of superior orders and that acts taken in conjunction with war could not also be criminal in nature.¹⁷⁷ On the whole, however, the Leipzig trials served to demonstrate that Germany did not accept the idea that its soldiers had committed “war crimes” deserving of punishment.¹⁷⁸

Germany’s Human Rights Violations during World War II and the Nuremberg Trials

Notwithstanding the Allies’ efforts to convince Germany and Germans that they had committed human rights atrocities, the World War I experience did nothing to change either Germany’s human rights practices or its belief that the world community should not be able to hold it accountable for committing crimes against international law. Instead, Germany’s practices only worsened during World War II. During World War II, German soldiers waged war on civil populations, destroyed much of Europe, and massacred prisoners of war. Furthermore, the war served as a cover for the Nazi plan to exterminate Europe’s Jewish population (as well as its gypsy and gay population) – committing what British Prime Minister Winston Churchill later called “probably the greatest and most horrible single crime ever

¹⁷⁶ Reginbogin, “Confronting ‘Crimes Against Humanity’ from Leipzig to the Nuremberg Trials,” 120; Claus Kress, “Versailles-Nuremberg-The Hague: Germany And International Criminal Law,” *International Lawyer* 40 (2006): 18-19.

¹⁷⁷ Claus Kress, “Versailles-Nuremberg-The Hague: Germany And International Criminal Law,” 17-18.

¹⁷⁸ Reginbogin, “Confronting ‘Crimes Against Humanity’ from Leipzig to the Nuremberg Trials,” 120; Kress, “Germany and International Criminal Law: Continuity or Change?,” 235.

committed in the whole history of the world.”¹⁷⁹

On the other hand, the world community did learn from the Leipzig trials that if states and their citizens were going to be held accountable for international crimes, the world community would have to take an active role in holding them accountable – rather than relying on the state itself to prosecute offenders. Although the Allies had considered holding the worst offenders accountable simply by executing them, they eventually agreed that even the top Nazi war criminals should be tried and given the benefits of American due process.¹⁸⁰ After much negotiation, and after Germany surrendered on May 8, 1945, the Allies established the Nuremberg tribunal “for the just and prompt trial and punishment of the major war criminals of the European Axis.” The Tribunal had jurisdiction over crimes against peace, war crimes, and crimes against humanity. The statute creating the Tribunal provided that heads of state were not immune from criminal liability. It also added that “superior orders” would not be available as a complete defense, though that defense could be considered in mitigating punishment. Four judges – one from each of the four major victorious Allied powers – were appointed to preside over the trials.¹⁸¹

The Nuremberg trials against twenty-two indicted defendants commenced on November 20, 1945.¹⁸² Although the defendants all challenged the jurisdictional foundation for the court and argued that no international treaty or other document criminalized any of the acts these Nazi

¹⁷⁹ Bass, *Stay The Hand Of Vengeance*, 193.

¹⁸⁰ Henry Stimson, President Roosevelt’s Secretary of War, is credited with insisting that even the top Nazi war criminals should be tried, rather than executed. Bass, *Stay The Hand Of Vengeance*, 150-51; Rhea, “Setting The Record Straight: Criminal Justice At Nuremberg,” 253-54; Harris, “A World of Peace And Justice Under The Rule Of Law,” 689.

¹⁸¹ Von Hebel, “An International Criminal Court – A Historical Perspective,” 19-20; Antonio Cassese, “From Nuremberg To Rome: International Military Tribunals To The International Criminal Court,” in *The Rome Statute Of The International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (Oxford: Oxford University Press, 2002), 7.

¹⁸² Indictments had been brought against 24 defendants, but one committed suicide and the other could not be tried for physical and mental reasons. Von Hebel, “An International Criminal Court – A Historical Perspective,” 19; Harris, “A World of Peace And Justice Under The Rule Of Law,” 690.

leaders were accused of committing, the trials proceeded.¹⁸³ Judgment was rendered on October 1, 1946. Twelve defendants received the death sentence; three were acquitted; and the remaining defendants were sentenced to varying terms of imprisonment.¹⁸⁴

As to the crimes against peace, the Tribunal concluded the defendants had waged a war of aggression which had been a crime under international criminal law since the 1928 Kellogg-Briand Pact (a multilateral treaty between, among others, the United States, Great Britain, Germany, France, Italy, and Japan, renouncing aggressive war). Regarding the war crimes charges, the Tribunal found the defendants guilty of violating the laws and customs of war, which it concluded were well-established laws and customs recognized by several treaties and by customary law. The defendants were also convicted of having committed crimes against humanity, which included inhumane acts against civilian populations and persecutions based on racial grounds – the major crime in this case being the systematic and planned extermination of Jews in Europe. However, the Tribunal found that acts committed prior to the outbreak of World War II in 1939 were not within its jurisdiction. Accordingly, the crimes committed against the Jewish people were only considered in connection with the “crimes against humanity” verdict to the extent those acts occurred during the war.¹⁸⁵

After World War II: Germany and the Protection of Human Rights

Given Germany’s past human rights abuses, and its refusal to believe that the conduct of its citizens was deserving of either international or domestic condemnation, one necessarily wonders how and why Germany became the country it is at present: a democracy with very high human rights ratings and high-quality domestic legal institutions that enforce the rule of law.

¹⁸³ Rhea, “Setting The Record Straight: Criminal Justice At Nuremberg,” 255-56.

¹⁸⁴ Harris, “A World of Peace And Justice Under The Rule Of Law,” 695.

¹⁸⁵ Von Hebel, “An International Criminal Court – A Historical Perspective,” 20.

Based on the evidence presented above, there can be no doubt that by the end of World War II, Germany had no respect for human rights or the idea of international criminal law. After all, even after the Allies condemned it for its behavior during the course of World War I, Germany and its citizens went on to commit even more heinous crimes during the course of World War II. And, as noted above, those who were tried at Nuremberg challenged those trials and complained that they signified nothing more than “victor’s justice.”

This section examines the time period following the Nuremberg trials up to the early 1990s when Germany again became a unified state. In the early periods after the Nuremberg trials, the evidence shows that the country and its citizens very much defended their own atrocious human rights practices and were hostile to efforts to deem those practices as “criminal,” – particularly by an international body composed only of victor states whose citizens had also committed bad behavior (although not as heinous as exterminating whole populations of people). However, as younger generations who were made aware of Germany’s shameful past, but who had taken no part in it, rose to positions of influence and power, Germany’s laws and practices, and its attitude toward allowing impunity for perpetrators of mass atrocities, began to change. Indeed, beginning in the 1960s, there is evidence of a younger generation of prosecutors and judges who were committed to punishing criminals.

By the early 1990s, Germany and its people even more readily embraced the idea of punishing criminals. Following the fall of the Berlin wall, Germany made sure that it had the laws and institutions to allow it to hold accountable the Russians who had committed human rights abuses against Germans in East Germany. In sum, over the decades following World War II, and coinciding with a generational shift in power, Germany evolved into a country that demonstrated a more positive position towards protecting against human rights abuses and

towards ensuring that abusers were brought to justice. That change in position obtains further support from the data. From the early 1980s (when the data is first available), Germany has received human rights ratings of between 6 and 8.

Consistent with the credible threat theory, it was in the 1990s and the decade following that Germany also evidenced a greater willingness to commit to international human rights treaties with stronger enforcement mechanisms. Simply put, when Germany's human rights practices and domestic law enforcement institutions were weak (or inclined to protect human rights abusers), the government committed only to international human rights treaties with the weakest state reporting enforcement mechanisms. Because the treaties contained weak enforcement mechanisms, Germany could commit without fearing a great loss of sovereignty even though it may not have been able or intend to comply with treaty terms. However, when its human rights practices improved, and after it had in place measures to decrease the likelihood of future human rights violations and had bolstered its domestic institutional capacity to deal with abusers, Germany's behavior changed. It joined international human rights treaties with stronger enforcement mechanisms: but it did so only when it had taken steps to ensure that it would better be able to comply with treaty terms and thus avoid a costly loss of sovereignty.

In this section, I examine the evolution in the German attitude towards human rights practices and international criminal law beginning with the Nuremberg trials up until the time of German reunification. I thereafter discuss this evolution in the context of Germany's post-World War II behavior as it related to the newly established international human rights regime.

The Reaction to the Nuremberg Trials

In the immediate aftermath of the Nuremberg trials, every indication is that Germans as a whole were unconvinced that the genocide and other atrocities committed by their people were

deserving of international punishment. They were generally resentful of the Nuremberg trials and the follow-up trials that were conducted in the occupied zones charging German soldiers with international crimes. At least one scholar argues that this reaction was in part based on pride: Germans could not recognize the validity of the judgments because they were an affront to German dignity.¹⁸⁶ The fact that the Allies prosecuted Germans for some acts which occurred solely within Germany was a particularly sore point: at least some Germans viewed charging the defendants with criminal acts on this basis as a unique invasion of their sovereign rights to conduct their domestic affairs as they saw fit. Hitler's deputy Goring, in fact, declared at the Nuremberg trials: "But that was our right! We were a sovereign State and that was strictly our business."¹⁸⁷

Germans raised other arguments about the unjustness of the punishments imposed by the Nuremberg trials as well. First, they argued that Germans were improperly prosecuted for crimes that were not in fact crimes under international or domestic law at the time they were committed. Second, they argued that the justice dispensed at Nuremberg and thereafter was "victor's justice," – and thus a form of injustice – in that it focused only on German wrongdoing while ignoring crimes committed by the Allies.¹⁸⁸

Although these arguments about the unjustness of the Nuremberg trials certainly do not excuse German atrocities or make them any less deserving of international approbation, it is worth noting that some scholars have also criticized the Nuremberg trials for those same reasons. There is significant debate about whether by charging and convicting Germans of crimes against

¹⁸⁶ Kress, "Germany and International Criminal Law: Continuity or Change?," 235-36.

¹⁸⁷ Reginbogin, "Confronting 'Crimes Against Humanity' from Leipzig to the Nuremberg Trials," 118. In fact, even Henry Stimson initially did not think it would be possible for the Allies to use an international military tribunal to prosecute the German's extermination of Jews within their own country since that conduct had no relation to the actual interstate war. He wrote to President Roosevelt: "Such courts would be without jurisdiction in precisely the same way that any foreign court would be without jurisdiction to try those who were guilty of, or condoned, lynching in our own country." Bass, *Stay The Hand Of Vengeance*, 175.

¹⁸⁸ Kress, "Germany and International Criminal Law: Continuity or Change?," 235-36.

humanity, the IMT applied law retroactively, thereby violating the principle against criminalizing actions that were not criminal when they were committed.¹⁸⁹ Those charges were premised on the acts of genocide committed by the Germans against German and other Jews. However, it was not until 1948 that genocide would be clearly defined by treaty as an international crime.¹⁹⁰ Therefore, some argue that Germans were convicted of a crime that was not actually an international crime at the time it was committed. On the other hand, others defend the Allied decision to prosecute the German genocidal acts as crimes against humanity, noting that in the absence of the Nuremberg trials, and given Germany's refusal to accept the responsibility for prosecuting its own at the conclusion of World War I, the acts would have likely gone unpunished.¹⁹¹ Moreover, although some of the acts with which the defendants were charged may not have been specifically criminalized, the Nuremberg trials proceeded on the theory that the acts were so heinous that the defendants could not claim they did not know they were committing crimes in the opinion of the world community.

For the purposes of this study, however, the point is not whether the Nuremberg trials properly applied international law, but rather how Germany perceived its own conduct during World War II. I submit that the fact that Germans were focused on arguments against the invalidity of the Nuremberg trials shows a failure to acknowledge their own culpability. The State Department of the United States came to a similar conclusion in a 1953:

‘The German position on the trials of war criminals is a problem which has continued to trouble us ever since the trials were held. The Germans have failed

¹⁸⁹Von Hebel, “An International Criminal Court – A Historical Perspective,” 20-21; Rhea, “Setting The Record Straight: Criminal Justice At Nuremberg,” 255-56.

¹⁹⁰ Reginbogin, “Confronting ‘Crimes Against Humanity’ from Leipzig to the Nuremberg Trials,” 118. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by a resolution of the United Nations General Assembly on December 9, 1948 and entered into force on January 12, 1951. By that Convention, the parties agreed that genocide is a crime under international law whether committed in time of peace or war that must be punished. Germany (West Germany at that time) acceded to the Convention on November 24, 1954.

¹⁹¹ Bass, *Stay The Hand Of Vengeance*, 179-80.

to accept the principles on which the trials were based and do not believe that those convicted were guilty. Their attitude is very much sentimental and cannot be influenced by arguments or an objective statement of the facts. They adhere to the view that the majority of the war criminals were soldiers who were punished for doing what all soldiers do in war, or indeed were ordered to do.’¹⁹²

Indeed, the German government later negotiated its non-recognition of the judgments in the various Nuremberg follow-up trials in the Convention on the Settlement of Matters Arising out of the War and the Occupation, further evidencing that Germany’s refusal to view its soldiers’ actions as illegal under international law.¹⁹³ Later, Germany went even further when it sought the pardon of persons who had been convicted in the follow-up trials conducted by the occupying powers. Many of those prisoners were released – apparently in exchange for Germany’s promise to agree to take the side against the rising threat of communism.¹⁹⁴

German Confrontation of its Nazi Past: An Evolution

On the other hand, not all Germans turned a blind eye to the atrocities committed by Germans during World War II. Beginning in the late 1950s, and continuing into the 1990s following reunification, the German government and its people took steps to ensure not only that perpetrators of mass atrocities or other human rights abuses would be punished for their conduct, but also that Germany had the kinds of laws and institutions that would make punishing such perpetrators possible. For example, in 1958, the government established the Central Investigative Agency for Nazi Crimes which was tasked with carrying out investigations of crimes against humanity Germans allegedly committed outside Germany.¹⁹⁵ As a result, over the next two decades some 6,000 Nazi defendants were brought to trial. Although in most cases the defendants were charged with and convicted of murder, rather than crimes against humanity, the

¹⁹²Kress, Germany and International Criminal Law: Continuity or Change?,” 235.

¹⁹³ Ibid.

¹⁹⁴ “Justice on Trial, The Legacy of Nuremberg,” American RadioWorks, July, 2002, <http://www.americanradioworks.org/features/justicetrials/index.html>.

¹⁹⁵ Kress, “Versailles-Nuremberg-The Hague Germany And International Law,” 23-24.

government nevertheless indicated an unwillingness to allow these Nazi criminals to escape justice. Indeed, at the time of these trials, the German Penal Code did not codify as criminal “crimes against humanity.”

It was during these two decades of prosecutions of Nazi defendants that the younger generations of Germans became a force for change: eager young prosecutors committed to prosecuting criminals did battle against an older, largely former Nazi judiciary willing to turn a blind eye to Nazi injustices.¹⁹⁶ And, they faced many challenges in the course of this battle. First, and foremost, as Professor Rebecca Wittmann notes, prosecutors could only proceed using the state’s domestic murder charge, a fact which hampered their ability to obtain convictions. Because of the way that charge was drafted, the older judges had significant flexibility in determining that certain elements of the crime were not met. For example, for a murder conviction, the prosecution had to show that the defendant acted with individual initiative and knowledge of the illegality of the act being committed. Accordingly, although the prosecutors were successful in convicting many of the guilty, many defendants were also successful in obtaining acquittals by claiming they were simply doing their jobs (such that they could not have acted with individual initiative, for example).¹⁹⁷

To further illustrate the difficulties faced by the young German prosecutors in bringing Nazi perpetrators of atrocities to justice, Professor Wittmann references a 1963 trial brought on behalf of the government by prosecutor Fritz Bauer against 20 high ranking Auschwitz perpetrators. The trial – called the Auschwitz Trial – lasted two years and involved hundreds of witnesses and tens of thousands of documents demonstrating the horrors that were committed at

¹⁹⁶ Rebecca Wittmann, *The Normalization of Nazi Crime in Postwar West German Trials*, in *The Nuremberg Trials: International Law Since 1945*, eds. Herbert R. Reginbogin and Christoph J. M. Safferling (Munich: K.G. Saur Verlag GmbH, 2006), 209.

¹⁹⁷ Wittmann, “The Normalization of Nazi Crime in Postwar West German Trials,” 209-211.

the concentration camp. Bauer was successful in obtaining convictions against the defendants, but only some of those defendants were convicted of crimes for which the sentence was life imprisonment. Specifically, the presiding judge found that only those defendants who murdered without official orders were guilty enough to deserve life sentences. As to those who “followed orders,” they were convicted of lesser crimes than murder since their crimes were crimes of complicity.¹⁹⁸

Nevertheless, and although there were difficulties, between the 1960s and the 1980s, the facts show that Germany’s attitude toward the protection of human rights and impunity began to change. The German government established an agency to investigate some Nazi atrocities and it provided resources to bring some 6,000 Nazi defendants to trial. Furthermore, although the young prosecutors were not always successful in convicting those defendants, the fact that they did battle with the old guard shows that attitudes were changing and that the government and some of the German populace did not believe that persons who had committed mass atrocities should escape justice.

In the 1990s, that new generation of Germans demonstrated an even greater respect for human rights and international criminal law – perhaps in part because Germans themselves suffered human rights abuses in East Germany when it was under Russian rule.¹⁹⁹ Following the fall of the Berlin wall, West German courts were called upon to judge the criminality of various acts that had occurred in East Germany – such as fatal shootings at the Berlin Wall or alleged miscarriages of justice which occurred during political trials under Communism. During the trials, West German judges were presented with many of the same defenses the defendants had raised at the Nuremberg trials – most particularly, the defense of superior orders and the

¹⁹⁸ Wittmann, “The Normalization of Nazi Crime in Postwar West German Trials,” 209-11.

¹⁹⁹ Christoph Burchard, “The Nuremberg Trial And Its Impact On Germany,” *Journal of International Criminal Justice* 4 (2006): 821.

principle of non-retroactivity of the criminal law. In the 1990s, however, West German judges rejected such defenses, concluding that inhumane laws permitting state-sponsored crime would have to yield to justice and a respect for human rights.²⁰⁰

It was also in the 1990s that the government finally and more fully made attempts to remedy the injustices that had been done within Germany and against Germans using state laws under Nazism. True, the government did act to repeal the most heinous of the Nazi laws immediately after World War II. Thus, the laws allowing for persecution on racial and religious grounds, allowing for arbitrary death sentences, and the like, were all taken off the books. But, at that time, Germany was under the influence of the Allied powers which were engaged in their “denazification” which included dismantling the Nazi regime – including its discriminatory laws against the Jewish people. It was not until much later, however, that Germany finally voided the judgments that were entered during the period of Nazi rule by which persons were convicted for their race or status or because they acted against the regime. For example, only in 1998 did the state dismiss the criminal judgments carried out during the Nazi period by the Nazi SS courts.²⁰¹

Of course, none of the above evidence demonstrates that there was an exact point at which German attitudes towards human rights and their Nazi past changed, or that the change was an unequivocal one or without inconsistencies. However, I do suggest that the evidence shows that with a generational shift, and also because of learning based on experiences in East Germany under Russian rule, German behavior and attitudes towards protecting individuals against human rights abuses changed for the better. In short, it was younger Germans who had not participated in World War II and who had not been indoctrinated into Nazi ideology that

²⁰⁰ Burchard, “The Nuremberg Trial And Its Impact On Germany,” 821-22.

²⁰¹ Wittmann, “The Normalization of Nazi Crime in Postwar West German Trials,” 214. In 1995, Lutheran church members and human rights groups in Berlin began demanding the government void, among other verdicts, a Nazi SS court verdict declaring Lutheran theologian Dietrich Bonhoeffer a traitor because he publicly challenged Nazism. Gustav Niebuhr, “Ideas & Trends: Undoing the Legacy of Nazi Courts,” *The New York Times*, February 11, 1996.

seemed most eager to confront Germany's past atrocities and ensure that the record was at least cleansed in part by bringing the worst criminals to justice. Moreover, as discussed below, only after this shift in behavior and attitude, and after Germany had shown that it had the laws and institutions that would enable it to protect against human rights abuses, did Germany commit more fully to the international human rights regime and its optional, and stronger, enforcement mechanisms.

Germany and the International Human Rights Regime: International Commitment Follows Domestic Reforms

The shift in German behavior and attitudes regarding protecting against human rights abuses did not manifest itself only in Germany's domestic actions and policies. Rather, as is shown below, following those reforms to its domestic actions and policies, Germany also began committing to international human rights institutions. Specifically, in the early post-World War II period, Germany committed only to international human rights treaties with weak enforcement mechanisms – meaning it could commit without fearing a costly loss of sovereignty if it failed to comply. By the 1990s, however, when its behavior and attitudes had evolved towards protecting against human rights abuses, and when it had in place domestic institutions to punish any abusers, Germany began committing to international human rights treaties with stronger enforcement mechanisms. Although many of the optional articles or protocols allowing for state or individual complaints were available for ratification in the late 1960s or early 1980s, Germany did not ratify them until 1993 at the very earliest. Table 20 below lists all of the treaties examined in Chapter Four and the years they were available for ratification, together with the year they were ratified by Germany.

Table 20: Commitment to the Six Primary International Human Rights Treaties

Treaty	Enforcement Mechanism	Date Open	Ratification Date
ICCPR	Reports	1966	1973
ICESCR	Reports	1966	1973
CERD	Reports	1966	1969
CEDAW	Reports	1980	1985
CAT	Reports	1984	1990
CRC	Reports	1989	1992
ICCPR Art. 41	State Complaints	1966	2001
CAT Art. 21	State Complaints	1984	2001
ICCPR Opt.	Individual Complaints	1966	1993
CERD 14	Individual Complaints	1966	2001
CAT 22	Individual Complaints	1984	2001
CEDAW Opt.	Individual Complaints	1999	2002
CAT Opt.	Committee Visits	2003	2008

Consistent with the credible threat theory, the evidence suggests that Germany may have promptly ratified several treaties with weak enforcement mechanisms simply because ratification would not impose significant compliance costs – not because the country was actually and sincerely committing itself to respecting and protecting universal human rights. Germany committed to the Genocide Convention in 1954, and it joined the ICCPR, the ICESCR, and the CERD (which covers racial discrimination) in the late 1960s and early 1970s. But, during these decades, much of the country appeared to be holding fast to the idea that the international community had no right to hold Germany accountable for human rights abuses committed during the two world wars. In addition, during these decades, the German judiciary seemed determined to excuse the conduct of those who committed mass atrocities during World War II on the grounds, among others, that those soldiers had simply been following superior orders. However, because the treaties only required states to report their compliance to a committee with non-binding powers, Germany could commit without worrying that compliance costs would ever be

great enough to result in a significant loss of its sovereignty. As discussed in previous chapters, where international human rights treaties have weak or non-existent enforcement mechanisms, scholars and others have observed a tendency of many states to commit as window dressing only, rather than because they want to be bound by international human rights norms.

The fact that in all instances Germany was slow to ratify any of the treaties with stronger enforcement mechanisms provides further evidence that Germany has a tendency to act rationally and consider compliance costs when making its decisions about whether to commit to international human rights treaties. Germany only ratified the treaties containing procedures for state complaints, individual complaints, or committee visits beginning in 1993. In most cases, it did not ratify those treaties with stronger enforcement mechanisms until after 2000.

Accordingly, while Germany initially ratified only weak treaties, it increasingly ratified more constraining treaties, but only after its behavior and attitudes towards protecting human rights abuses changed. However, because Germany put measures in place to deal with the likelihood of future human rights violations and improved the ability of its legal institutions to deal with those issues, the costs of complying with those international human rights treaties decreased – even though the treaties themselves contained stronger enforcement mechanisms. Indeed, the data collected by Amnesty International and the State Department indicate that by the time Germany ratified these treaties with stronger enforcement mechanisms, its human rights practices were among the very best. Since 1990, Germany has consistently scored 7 or 8 out of a possible 8 on the physical integrity rights scale (except for one year where it received a 6).²⁰²

Strong Leadership in Negotiations and Support for a Strong Court

In addition to increasingly binding itself to international human rights treaties

²⁰² Similarly, from 1990 forward, Germany has scored between 1 and 2 on the political terror scale, which ranges from 1 to 5, with 1 representing the best human rights practices.

with stronger enforcement mechanisms beginning in the 1990s, beginning in about that same time period, Germany played a significant leadership role in the creation of the ICC. From the start of negotiations, Germany was a member of the like-minded group of states that supported a strong and independent prosecutor and court. In fact, it was among the very few states that argued for universal jurisdiction over the core treaty crimes – a position which shows just how far Germany had evolved from its post-World War II position, wherein it argued that the Allies had no right to invade its sovereignty and punish its citizens for committing war crimes or crimes against humanity. After the Rome Statute was adopted, William Pace, the Convenor of the NGO Coalition for an International Criminal Court commented on Germany's leadership role: He stated:

No country can be prouder than Germany of their participation and support for the ICC! No country knows better than Germany the need for the ICC. The German refusal to accepting what they called an “alibi court,” and their resistance to the highly publicized United States threats to the German leaders during the Rome Conference deserves great appreciation by the world community.²⁰³

Given its past, it seems surprising that Germany would take a leadership role in creating and supporting an international criminal court with strong enforcement powers. However, the past is the past. By the time the ICC was becoming a reality, Germany had the kind of human rights practices and institutions that would make compliance with treaty terms relatively costless even in the case of a human rights treaty with the very strongest enforcement mechanisms. And, by its active role in negotiations, it demonstrated its awareness of the strength of the ICC's enforcement mechanisms. Furthermore, not only did it already have good practices at the time the ICC was being created, but also after its creation, Germany took additional steps to make compliance even less costly: it enacted domestic laws enabling it to prosecute any acts contrary

²⁰³ William R. Pace, “The Relationship Between The International Criminal Court And Non-Governmental Organizations,” in *Reflections on the International Criminal Court*, 197.

to the Rome Statute, thereby ensuring that its citizens would not have to be hauled to The Hague for prosecution. Thus, Germany's decision to push for a strong and independent ICC and to commit to the ICC is rational because its compliance costs, and its risks to sovereignty, are minimal even though the court's enforcement mechanisms are relatively strong.

However, and while I do argue that compliance costs and the credible threat theory best explain Germany's decision to ratify the ICC, there may be other factors that contribute to explaining Germany's leadership role in pushing for such a strong and independent court. First, because of its past experience with Nuremberg, it makes sense that Germany would want to ensure that any international criminal court was not created with the same perceived flaws. Germany's negotiating positions show that it wanted a court that would fairly dispense justice to any and all who committed mass atrocities, rather than a court that dispensed justice for political reasons or only to those who were the losers in battle. By participating in the creation of a court that clearly defined the crimes over which it would have jurisdiction, Germany was ensuring that states and individuals were clearly warned that their conduct violated international law before the international community could play a role in prosecuting them.

Finally, although the evidence is consistent with the idea that Germany would not have ratified the ICC treaty but for a rational calculation that ratification would impose few compliance costs, individuals – particularly Hans-Peter Kaul – were instrumental in developing Germany's positions vis-à-vis the court and in arguing for its importance. Of course, in the absence of these individuals, other German leaders may have filled the void. However, as can be seen below, Hans-Peter Kaul and a few others played a decisive role in the causal chain that led to Germany's ratification of the Rome Statute and may have caused Germany to play a larger role in the creation of the court than it otherwise would have. They also may have made the

country's commitment to the ICC more prompt or stronger than it otherwise would have been. Therefore, although the evidence still shows Germany ratified the treaty rationally knowing that it could and would comply with treaty terms, case study analysis has identified some individual drivers that contributed to determining Germany's behavior in ICC negotiations and thereafter.

Below, I examine Germany's role in the creation of the ICC by looking at the specific proposals it made, and the positions it took, regarding the terms and content of the ICC treaty beginning from the adoption of the 1994 International Law Commission Draft Statute, up to and including the negotiations during the Rome Conference. I focus primarily on a core set of issues which tended to produce great debate amongst the various state delegations inasmuch as they were relevant to the potential strength and independence of the prosecutor and the court. Those issues include (1) the court's exercise of jurisdiction, including the role of the Security Council in referring cases; (2) the powers of the prosecutor to commence cases; and (3) the nature of state cooperation regarding the surrender of nationals to the ICC.

Germany's Initial Position on the ICC

Official records of the various negotiations leading up to the adoption of the Rome Statute indicate that Germany supported the idea of an international criminal court, and more specifically, a powerful and independent prosecutor and court.²⁰⁴ Among other things, Germany stated in its comments in connection with the ILC 1994 Draft:

Germany is one of the countries that for years have been advocating stronger jurisdiction in international relations. In the various multilateral organizations, especially the United Nations, Germany has regularly explained why it considers the creation of an international criminal court necessary. The unbearably large number of regional conflicts which lead to massive violations of human rights and

²⁰⁴ Comments of Governments on the Report of the Working Group on a draft statute for an international criminal court, A/CN.4/458, Addendum 3, 7-10.

humanitarian international law shows the urgency of practical steps to establish a universal system of criminal jurisdiction. Developments of recent years justify the hope that this goal can now be attained.²⁰⁵

Furthermore, although comments were very general at this early stage of the proceedings since the exact nature and scope of the court had yet to be determined, Germany did express an interest in a treaty-based court with sufficient “legitimacy and universality” to exercise criminal jurisdiction. In addition, Germany argued that even if the court did have a link to the United Nations, such link should not be allowed to “impair its independence and integrity.” It also proposed that the “court’s jurisdiction should be as comprehensive as possible.” Finally, it supported allowing the Security Council to “be in a position to submit specific cases to the court.”²⁰⁶

The Issue of the Court’s Jurisdiction

Germany continued to argue for a strong and independent court over the next several years when the proceedings moved from more general discussions to purposeful engagement with statutory language and the drafting of legal text. First, regarding the highly-contentious issue of jurisdiction, and unlike many other states, Germany consistently proposed the court be given broad inherent jurisdiction over the core crimes of genocide, crimes against humanity, and war crimes. Early ILC drafts reflected state sovereignty concerns and allowed states to limit or extend their acceptance of the ICC’s jurisdiction over particular crimes and/or for particular time

²⁰⁵ Ibid. at 7.

²⁰⁶ Ibid. at 7. Germany’s Vice-Chancellor and Minister of Foreign Affairs, Mr. Klaus Kinkel, reiterated Germany’s support for the creation of a permanent international criminal court at the United Nations General Assembly meeting in September 1997. United Nations General Assembly, 52nd Sess., Sept. 24, 1997, UN Doc. A/52/PV.9, 15 (calling for an international criminal court of justice and stating that the “court must be empowered to act on its own accord where genocide, crimes against humanity, war crimes and wars of aggression are concerned, and to do so wherever national courts either do not exist or cannot or are unwilling to prosecute such crimes.”).

periods – an “opt-in” regime.²⁰⁷ A French proposal to the Preparatory Committee in August 1996 called for a jurisdictional regime whereby all states affected by a case would have to give their consent in order for the ICC to proceed (for example, the state of the territory where the crime was committed, the state of the nationality of the victim, and the state of the nationality of the victim).²⁰⁸ The United States pushed for a regime whereby the court’s jurisdiction would be triggered by a Security Council referral (which would thereby put a lot of the power in the hands of the powerful countries who are permanent members of the Council). Germany, however, submitted a proposal – and continued to push for a proposal – which envisioned a much broader role for the court. Its February 1996 proposal read: “A State which becomes a party to the Statute thereby accepts the inherent jurisdiction of the Court with respect to the [core] crimes . . .”²⁰⁹

Germany continued to argue for universal jurisdiction before and during the Rome Conference. In March 1998, it submitted to the Preparatory Committee an informal discussion paper where it again proposed that state parties automatically accept the jurisdiction of the court with respect to the core crimes.²¹⁰ Germany explained the reason for its proposal as follows:

Under current international law, **all States may exercise universal criminal jurisdiction** concerning the acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. . . . Given this background, there is no reason why the ICC – established on the basis of a Treaty concluded by the largest possible number of States – should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes.

²⁰⁷ Hans-Peter Kaul, “Preconditions To The Exercise Of Jurisdiction,” in *The Rome Statute of the International Criminal Court*, 593.

²⁰⁸ Draft Statute submitted by France, UN Doc. A/AC.249/L.3 (August 6, 1996), Art. 34.

²⁰⁹ Kaul, “Preconditions to Exercise of Jurisdiction,” in *The Rome Statute of the International Criminal Court*, 595; UN Doc. A51/22, Supp. No. 22 A, Report of the Preparatory Committee on the Establishment of an International Court, Vol. II (Compilation of Proposals), 73, Proposal 1.

²¹⁰ UN Doc. A/AC/249/1998/DP.2 (March 23, 1998).

This means that, like the Contracting States, the ICC should be competent to prosecute persons which have committed one of these core crimes, regardless of whether the territorial State, the custodial State or any other State has accepted jurisdiction of the Court.²¹¹

The German proposal was generally supported by NGOs and many of the like-minded states – of which Germany was a leader²¹² and member, and which advocated for a strong and independent ICC.²¹³ And, Germany's Minister of Justice reiterated Germany's support for an ICC with universal jurisdiction during the Rome Conference when he stated: "Germany is committed to the creation of a Court with automatic universal jurisdiction over the core crimes, including war crimes in internal conflicts . . ."²¹⁴ However, in Rome, it ultimately became clear that enough states rejected the doctrine of universality, with the United States being a strong and vocal opponent against the idea. Therefore, the German proposal was dropped from the Discussion Paper of July 6, 1998, eliminating it from consideration as an option.²¹⁵ On July 17, 1998, the final proposal on which states were permitted to vote included what is presently Article 12 of the Rome Statute. Article 12 provides that states accept the ICC's jurisdiction over the core crimes upon becoming parties, but that the court's exercise of jurisdiction over a case requires that either the state in which the acts occurred or the state whose national committed the crimes are parties to the ICC treaty. In addition, based on a French proposal, pursuant to Article

²¹¹ Ibid.

²¹² The leaders of the like-minded group of states included Germany, Netherlands, Australia, Canada, Argentina, and also South Africa. John Washburn, "The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century," *Pace International Law Review* 11 (1999): 361, 368.

²¹³ Kaul, "Preconditions to Exercise of Jurisdiction," in *The Rome Statute of the International Criminal Court*, 598; Phillipe Kirsch and John T. Holmes, "The Rome Conference On An International Criminal Court: The Negotiating Process," *The American Journal of International Law* 93 (1999): 4. The like-minded group of states was formed during negotiations in 1996 and evolved to include about 60 states, among them the middle powers (European countries, Canada, Australia, and New Zealand, for example) and developing countries. Bos, "From the International Law Commission to the Rome Conference (1994-1998).

²¹⁴ "Role of United Nations Security Council In International Criminal Court Among Issues Discussed This Afternoon At UN Conference," Press Release L/2877, Statement of Edzard Schmidt-Jortzig, Minister of Justice of Germany, June 16, 1998.

²¹⁵ Kaul, "Preconditions to Exercise of Jurisdiction," in *The Rome Statute of the International Criminal Court*, 598-99.

124 of the Rome Statute, states may opt out of the court's jurisdiction for war crimes for a period of seven years.

Although Germany did vote for the adoption of the Rome Statute complete with Article 12, its representatives maintain that Germany would have preferred that states had backed its universal jurisdiction proposal.²¹⁶ On the other hand, Hans-Peter Kaul also notes that without compromise, it would have been impossible to obtain broad state support for the creation of an international criminal court.²¹⁷ Moreover, he suggests that the scope of the court's jurisdiction would have been even more limited had it not been for Germany's last minute efforts. Specifically, because of Germany, the jurisdictional regime did not have more opt-outs beyond that for war crimes for a seven-year period inasmuch as the French proposal had originally also applied to crimes against humanity.²¹⁸

The Role of the ICC Prosecutor

Another extremely contentious issue during negotiations concerned the role and independence of the prosecutor, particularly as regards whether he would have power to initiate investigations on his own motion (*proprio motu*).²¹⁹ In fact, the idea that the prosecutor would have such powers was initially considered so radical that the 1994 ILC Draft Statute contained

²¹⁶ Hans-Peter Kaul (Head of Germany's Delegation to the Prep Comm and Deputy Head of Germany's Delegation to the Rome Conference) and Claus Kress (a member of Germany's Delegation to the Prep Comm and the Rome Conference) have expressed disappointment in the ultimate state compromises which led to a regime which was not based on universal jurisdiction for the core crimes. However, they note that the compromise package on jurisdiction still represents a significant advance from the jurisdictional regime that was outlined in the 1994 ILC draft. Hans-Peter Kaul and Claus Kress, "Jurisdiction And Cooperation In the Statute Of The International Criminal Court: Principles And Compromises," in Yearbook of International Humanitarian Law (1999): 171-72.

²¹⁷ In another article, Kaul states that Germany made some concessions on the jurisdictional scheme in an effort to accommodate the United States which it hoped to get on board if some safeguards were built into the statute. Hans-Peter Kaul, "The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions," in The Rome Statute of the International Criminal Court: A challenge to impunity, edited by Mauro Politi and Giuseppe Nesi (Burlington: Ashgate Publishing Co., 2001), 62.

²¹⁸ Hans-Peter Kaul, "Breakthrough In Rome: The Statute Of The International Criminal Court," Law and State 59 (1999): 122.

²¹⁹ The *proprio motu* power is also sometimes referred to as the *ex officio* power (power by virtue of his office).

no provision for such powers. By that draft, cases could only be commenced based on referrals from a State Party or the Security Council. The pros and cons of allowing the prosecutor *proprio motu* powers, however, were debated during the Ad Hoc Committee meetings in 1995 and during the 1996 Preparatory Committee. Eventually, states clearly divided into two camps. By 1997, the like-minded states were strongly behind the idea of *proprio motu* powers. They argued that these powers were essential to a strong and independent court which otherwise could face a situation where significant and important matters were not referred for political or diplomatic reasons. Opponents, on the other hand, argued that an independent prosecutor might be tempted to initiate cases frivolously or for political reasons.²²⁰ Germany was a member of the like-minded states and favored a strong and independent prosecutor.

However, because there was strong opposition to the idea of a prosecutor with *proprio motu* powers, in 1998, it became clear that some compromises were again necessary if the like-minded states were to have any hope of garnering support for their proposal. Germany and Argentina proposed the compromise solution which eventually became Article 15 of the Rome Statute.²²¹ To assuage critics who were concerned that an independent prosecutor would be tempted to mount frivolous or politically-motivated investigations, Germany and Argentina suggested some limited controls on the prosecutor's powers to mount investigations. Specifically, although the prosecutor would initially be able to conduct a preliminary investigation (based on information received by states, organizations, or other reliable sources), it would only be able to proceed further upon confirmation by the Court. The proposal was well-received because it reduced the power held in the hands of one individual, while at the same time

²²⁰Morten Bergsmo and Jelena Pejic, "Article 15: Prosecutor," in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, ed. Otto Triffterer (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 359-362.

²²¹ Proposal by Argentina and Germany, reflected in A/AC.249/1998/WG.4/DP.35 (March 25, 1998).

preserving an alternative whereby investigations could be mounted without state or Security Council support.²²²

The Issue of State Surrender of Nationals to the ICC

Finally, another great debate – and one relevant to the court’s power to effectively operate – centered on state obligations to cooperate in surrendering their nationals to the ICC.²²³ In fact, Article 87(2) (b) of the 1998 Preparatory Committee Draft Statute originally allowed a State Party to deny a request for surrender if “the person is a national of the requested State.”²²⁴ During Rome Conference negotiations, it became clear that a number of countries would not accept deleting this exception to the requirement to cooperate with the court because their constitutions expressly prohibited the extradition of their nationals. China, Israel, Japan, Mexico, the United States, and a number of Arab states were among those that held fast to the idea that cooperation with the court should not include the obligation to surrender nationals to the ICC.²²⁵ Although Germany at the time had a constitutional prohibition on the extradition of its nationals, like other like-minded states, it nevertheless took the position that the prohibition would be inapplicable in the context of handing persons over to the ICC.²²⁶

Not only did Germany support cooperation even where it would involve surrendering nationals, but also the German delegates played a role in persuading other states to adopt their view.²²⁷ Hans-Peter Kaul and Claus Kress argued that the ordinary “horizontal” approach to

²²² Phillipe Kirsch and Darryl Robinson, “Initiation of Proceedings by the Prosecutor,” in *The Rome Statute of the International Criminal Court*, 660.

²²³ Phakiso Mochochoko, “International Cooperation and Judicial Assistance,” in *The Making of the Rome Statute*, 310-11. Phakiso Mochochoko (Lesotho) was the Chairman of the working group on cooperation at the Rome Conference.

²²⁴ UN Doc. A/CONF.183/2/Add.1, 159.

²²⁵ Kaul and Kress, “Jurisdiction And Cooperation In The Statute Of The International Criminal Court: Principles And Compromises,” 161.

²²⁶ Mochochoko, “International Cooperation and Judicial Assistance,” 311.

²²⁷ *Ibid.*

cooperation, whereby states guarded their sovereignty in response to extradition requests from other states, is inappropriate “in the context of an international judicial body responsible for judging international core crimes.”²²⁸ They noted that the relationship between nations and the ICC was a vertical one where one could appropriately view the court’s complementary jurisdiction as something of an extension of national jurisdictions. Furthermore, they suggested that the goal of prosecuting international crimes was one that serves the international community as a whole, such that individual states should be supportive of the goal, rather than seek to subvert it by protecting their nationals against surrender to the court.²²⁹ In addition, from a practical standpoint, refusing to extradite nationals to the ICC would make for an essentially unworkable ICC.²³⁰

Despite the efforts of Germany and others, however, the issue of whether states would be required to surrender their nationals to the court remained unresolved until the very conclusion of the Rome Conference. In the end, however, states were persuaded that surrendering a national to the ICC was fundamentally distinguishable from interstate extradition, and also that the complementarity regime afforded some protection against surrender since the state could prosecute its nationals in its own domestic courts. Thus, the Rome Statute states adopted envisions a powerful court to which states have obligated themselves to surrender their own nationals in the event they are unwilling or unable to prosecute them domestically.²³¹

²²⁸ Kaul and Kress, “Jurisdiction And Cooperation In The Statute Of The International Criminal Court: Principles And Compromises,” 158.

²²⁹ Ibid. at 158-60.

²³⁰ Ibid. at 160.

²³¹ Rome Statute, Art. 89.

Germany's Record on ICC Commitment and Compliance

Germany's behavior after the Rome Conference is also consistent with that predicted by the credible threat theory in that it has acted as one would expect of a state with regular and high human rights and rule of law ratings, but also a state that believed in – and continues to believe in – the strength of the ICC's enforcement mechanisms. Germany readily signed and ratified the treaty creating the court. In addition, it quickly amended its national laws to enable it to comply with the terms of the treaty and cooperate with the court.

Signing and Ratification

Germany went on record and signaled its intention to rapidly sign the Rome Statute during a United Nations General Assembly meeting on October 22, 1998. The German representative, Mr. Westdickenberg, praised the creation of the ICC and its potential to deter individuals from committing atrocities by enforcing accountability where national courts were unwilling or unable to act. He further acknowledged the impressive number of states that had already signed the ICC treaty, and indicated that Germany also planned to sign by the end of the year.²³² Germany later honored that promise on December 10, 1998.

Germany then began the work of passing a bill to permit it to ratify the Rome Statute. At the first reading of the bill on ratification on February 24, 2000, the German Foreign Minister J. Fischer emphasized Germany's preference for a strong and workable court. He stated:

‘[A]nother goal in this framework must be to ensure that those States skeptical of the Court do not water down the compromise agreed in Rome. Germany had hoped that Rome would come up with a more robust arrangement on the competence of the Court. This aspect must not be weakened further. The integrity of the Rome Statute must be preserved so that the Court's

²³² UN Doc. A/C.6/53/SR.12, October 22, 1998, ¶¶ 78-79.

jurisdiction is not diluted.’²³³

Germany demonstrated its continued support for the court when on October 27, 2000 at the third reading of the ratification bill, Germany’s legislature unanimously approved ratifying the Rome Statute. At the invitation of Hans-Peter Kaul, Whitney R. Harris, a member of the United States prosecuting team at the IMT at Nuremberg, attended that reading. He confirms that after extensive discussion, the bill was approved without a single dissenting vote, a fact which he suggests shows Germany’s “approval of the principles of the Nuremberg Trial.”²³⁴ Thereafter, on December 11, 2000, Germany became the twenty-fifth state to join the court.

Several issues concerning Germany’s prompt commitment to the ICC and strong domestic legislative support for the court are worth noting as they relate to conclusions about why Germany ratified the Rome Statute. First, the evidence fairly conclusively shows that theories about normative pressure do not explain Germany’s commitment decision. It was a leader, and not a follower, in negotiations regarding the creation of the court. It was a leader even regionally amongst the European nations which were counted among the like-minded contingent. For example, as discussed above, it did not back French proposals to weaken the jurisdiction of the court or side with France and Great Britain when they initially supported a larger role for the Security Council in determining which cases could be brought before the ICC. Furthermore, while NGOs tended to favor the same positions as those advocated by Germany and the like-minded states, there is no evidence that Germany adopted any of its negotiating positions or decided to commit to the court only because of NGO pressures. Moreover, this is not a situation where Germany took positions or ratified the court in order to please other nations

²³³ Hans-Peter Kaul, “The Continuing Struggle on the Jurisdiction of the International Criminal Court,” in *International and National Prosecution of Crimes Under International Law, Current Developments*, eds. Horst Fischer, Claus Kress, and Sascha Rolf Luder (Berlin Verlag, 2001), 31 n. 21.

²³⁴ Whitney R. Harris, “Tyranny on Trial – Trial of Major German War Criminals at Nuremberg, Germany, 1945-1946,” in *The Nuremberg Trials: International Criminal Law Since 1945*, 110.

that might be able to provide it with benefits. In fact, it repeatedly stood up to the United States, a powerful country which it now counts amongst its greatest allies and supporters.

Second, Germany was among the very first states to ratify the Rome Statute, even though its domestic ratification process is also very difficult since it requires legislative approval before the state can ratify an international treaty. Recall that theory predicts that states with more difficult ratification processes will be less likely or slower to ratify international treaties. But, Germany's legislature swiftly and unanimously ratified the ICC treaty. Thus, even though Hans-Peter Kaul and Claus Kress, among others, played great leadership roles during ICC negotiations, and even though they may have acted to persuade others within Germany to accept the idea of the ICC, the record shows that Germany's entire government was behind ICC ratification. And, by the statement made during the first reading of the bill to the legislature, all in the government must have been made aware that the enforcement mechanisms associated with the court were relatively strong – albeit not as strong as Germany would have preferred. Accordingly, this is not a case where rational concerns fell by the wayside because of the interests of a few individuals. Rather, and as the evidence discussing Germany's ICC domestic implementing legislation shows, Germany rationally considered ICC ratification and acted rationally to ensure that it could immediately comply with treaty terms, thereby further minimizing compliance costs.

National Implementing Legislation

At around the time of ratification and shortly thereafter, Germany amended its national laws to allow it (1) to prosecute domestically the crimes over which the ICC has jurisdiction and (2) to cooperate with the court in a number of respects, including in surrendering its own nationals. In June 2002, the German legislature passed the Code of Crimes against International

Law (“CCAIL”).²³⁵ Although it does not always use the exact same wording as that used in the Rome Statute, the CCAIL essentially incorporates into German law the substantive criminal law prescriptions of the Rome Statute, thereby providing Germany with the legal framework to insure that the crimes covered by the ICC treaty can be punished domestically should they occur.²³⁶ Thus, it provides for universal jurisdiction over war crimes, crimes against humanity, and genocide.²³⁷ Germany viewed these changes to its substantive laws as necessary because prior to the enactment of the CCAIL, Germany had never before codified war crimes and crimes against humanity. Although it had codified the crime of genocide after it ratified the Genocide Convention, by the CCAIL, Germany updated terminology regarding that crime to make it consistent with the Rome Statute.²³⁸ Like the Rome Statute, the CCAIL provides no statute of limitations for the covered crimes.²³⁹

On the other hand, the CCAIL does not contain special provisions incorporating the “general principles” contained in Articles 22 to 33 of the Rome Statute. Those provisions relate to, for example, criminal participation and attempt, the irrelevance of official capacity, and the necessary mental state of the perpetrator. Those matters are covered by general German criminal

²³⁵The full text of the law is available in English at the Web site of the Federal Ministry of Foreign Affairs, at <http://www.ausaertiges-amt.de/www/en/infoservice/download/pdf/vn/istgh/istgh.pdf>.

²³⁶ Andreas Zimmerman, a member of the German delegation at the Rome Conference and one of the members of the expert group appointed to deal with the implementation of the Rome Statute, notes that the CCAIL sometimes purposely deviates from particular wording in the Rome Statute. He explains that some of the definitions in the Rome Statute were the result of political compromises and might not reflect customary international law. As a result, he notes that some of the language in the CCAIL was proposed so as to make Germany’s code consistent with customary international law. Andreas Zimmerman, “Main Features of the new German Code of Crimes against International Law (*Volkerstrafgesetzbuch*),” in *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries*, ed. Matthias Nener (Berlin: Berliner Wissenschafts-Verlag GmbH, 2003), 138-39.

²³⁷ Gerhard Werle and Florian Jessberger, “International Criminal Justice Is Coming Home: The New German Code Of Crimes Against International Law,” *Criminal Law Forum* 13 (2002): 201. Section 1 of the CCAIL states: “This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.”

²³⁸ Michael P. Hatchell, “Note and Comment: Closing the Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach,” *ILSA Journal of International & Comparative Law* 12 (2005): 202.

²³⁹ CCAIL, at § 5; Rome Statute, at Art. 29.

law, the theory being that the CCAIL only needed to specifically track the Rome Statute where the norms or provisions of that Statute differed significantly from German criminal law. As Professors Werle and Jessberger explain, whether those norms and provisions differ significantly can be a matter of debate.²⁴⁰ Nevertheless, Germany has enacted a code of international criminal laws which incorporates the crimes of the Rome Statute, thereby enabling Germany to prosecute mass atrocities should it need to do so in order to avoid a loss of its sovereignty to the ICC.²⁴¹ Moreover, given that Germany's human rights ratings are, and have been, quite high for the last two decades, the likelihood that Germany's government or citizens will commit such mass atrocities is probably quite low.

It is worth noting that compliance with the Rome Statute does not by its terms specifically require states to incorporate prohibitions against war crimes, crimes against humanity, or genocide into domestic legislation. However, because the ICC treaty is based on a system of complementarity whereby the preference is for national prosecutions, and the ICC exists as a court of last resort, states are essentially encouraged to ensure that their domestic laws allow them to prosecute mass atrocities domestically. Therefore, while failing to implement domestic legislation criminalizing the crimes covered by the ICC treaty will not necessarily result in a conclusion that the state is unable to prosecute, states that fail to implement such legislation may face a greater risk to their sovereignty since the ICC may conclude in a particular

²⁴⁰ Werle and Jessberger, "International Criminal Justice Is Coming Home: The New German Code Of Crimes Against International Law," 202.

²⁴¹ Matthias Neuner, a legal advisor to the Office of the Prosecutor of the ICTY has expressly examined the CCAIL and compares its provisions to those of the Rome Statute. Based on his analysis, he concludes that despite some differences, "Germany can effectively prosecute persons who committed crimes against international law and is therefore in a position to actively make use of the opportunities provided by the principle of complementarity." Matthias Neuner, "General Principles of International Criminal Law in Germany," in *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries*, ed. Matthias Nener (Berlin: Berliner Wissenschafts-Verlag GmbH, 2003), 136.

situation that they are unwilling or unable to prosecute a crime domestically.²⁴² With that said, of course, there are different ways for states to ensure that they can prosecute mass atrocities domestically, and whether they need to fully amend their criminal code will depend on the state of existing national law. For example, in some cases, implementation has involved only the need to extend domestic jurisdiction to cover crimes committed outside state territory.²⁴³

Germany, however, chose to fully incorporate the ICC crimes into its domestic legislation by way of a separate code which addressed only international crimes. Hans-Peter Kaul explained this choice during an event hosted by the CICC during a Preparatory Commission meeting at United Nations headquarters in April 2002.²⁴⁴ He noted that prior to enactment of the CCAIL, Germany would not have been able to punish war crimes or crimes against humanity *per se*. Germany would have had to proceed, instead, by charging, for example, the crime of murder or inflicting grave bodily harm. In addition, the state wanted to clarify that universal jurisdiction covered these mass atrocities by including that provision in a new draft code for international crimes since Germany's judiciary had previously interpreted universal jurisdiction in its criminal code for genocide restrictively. Furthermore, Kaul explained that Germany had to reformulate these crimes in order to satisfy the constitutional requirement that a crime must have been clearly determined and specifically prohibited at the time the act was committed.²⁴⁵

Germany also amended its constitution and laws in order to allow it to cooperate with the

²⁴² Werle and Jessberger, "International Criminal Justice Is Coming Home: The New German Code Of Crimes Against International Law," 194-95.

²⁴³ Helen Duffy, "National Constitutional Compatibility and the International Criminal Court, Duke Journal of Comparative and International Law, 11 (2001): 19 (referencing the implementing legislation of Canada and New Zealand).

²⁴⁴ Hans-Peter Kaul, "International Criminal Law In Germany: The Drafts of the International Crimes Code and the Rome Statute Implementation Act," German Delegation to the PrepCom, presented at the 9th Session of the Preparatory Commission for the International Criminal Court at the UN on April 18, 2002.

²⁴⁵ Ibid. at 2-4. Werle and Jessberger also note that the constitutional provisions on legal certainty with respect to the criminality of particular acts are strict by international comparison. Werle and Jessberger, "International Criminal Justice Is Coming Home: The New German Code Of Crimes Against International Law," 200.

ICC. First, on December 4, 2000, Germany amended its constitution (Basic Law 16) to allow German nationals to be surrendered to the ICC.²⁴⁶ Contemporaneously with the passage of the CCAIL, Germany also passed the Law on Cooperation with the International Criminal Court (“ICC Cooperation Act”).²⁴⁷ That Act governs, among other things, Germany’s obligations to cooperate with the ICC in surrendering suspects.²⁴⁸ It addresses other aspects of cooperation as well, such as enforcing any orders of forfeiture issued by the ICC.²⁴⁹ Furthermore, for example, it states that Germany may waive any claim for reimbursement of expenses incurred by cooperation with the ICC.²⁵⁰

As with Germany’s ratification decision, these acts, too, demonstrate Germany’s commitment to the ICC and its intention to comply with treaty terms. They also evidence a country that is determined to ensure that the compliance costs associated with complying with ICC treaty terms are minimized. Moreover, it is again worth noting that the constitutional amendment and the enactment of comprehensive legislation incorporating the substantive crimes covered by the ICC treaty into its domestic laws required the government as a whole to act – not just a few individuals. While those individuals may have been drivers in persuading Germany to support a strong and independent ICC, those individuals did not, and could not, make Germany’s commitment decision. That decision was made by the government as a whole, and the evidence shows that rational concerns for compliance and avoiding costly losses of sovereignty were of critical importance.

²⁴⁶ Kaul, “International Criminal Law In Germany: The Drafts of the International Crimes Code and the Rome Statute Implementation Act,” German Delegation to the PrepCom, presented at the 9th Session of the Preparatory Commission for the International Criminal Court at the UN on April 18, 2002.

²⁴⁷ An English version of the text of the ICC Cooperation Act is available on <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatRecht/IStGH/Hintergrund.html>.

²⁴⁸ ICC Cooperation Act, at §§ 2-33.

²⁴⁹ ICC Cooperation Act, at §44.

²⁵⁰ ICC Cooperation Act, at § 71.

Germany's Leadership Role in Advancing Commitment and Compliance Post-Ratification

Germany has continued as a leader in advancing commitment to, and compliance with, the ICC treaty post-ratification. For example, the website for Germany's Federal Foreign Office describes Germany's role in supporting the ICC and in implementing conforming domestic legislation, and states that "the German Government will continue to do its utmost to ensure that the ICC can work as effectively as possible and that it receives broad support from the international community."²⁵¹ And, since ratification, Germany's spokespeople have called on other states to join the court. In its ratification press release, Hans-Peter Kaul "reiterated his country's firm hope that States that had not done so would sign and ratify the Rome Statute as early as possible." He particularly beseeched the United States to promptly join the court.²⁵² Kaul has continued to appeal to the United States, arguing that the court needs American support politically, morally, and materially.²⁵³

In addition, Germany has been a leader in calling for states to abide by their treaty obligations. More generally, Hans-Peter Kaul has argued that states should support the overarching goals of the ICC treaty and prosecute any core crimes in their domestic courts so as to minimize the burden on the ICC. At the same time, he encouraged states to promote the universal character of the ICC and to persuade other states to join.²⁵⁴

Finally, Germany voiced strong opposition to the bilateral immunity agreements the United States was asking states to sign, which agreements required them to refuse (even if they

²⁵¹ The Federal Foreign Office website is available at <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatRecht/IStGH/Hintergrund.html>.

²⁵² Press Release, "South Africa, Germany Announce Ratification Of Statute To Establish International Criminal Court," L/2966, November 27, 2000.

²⁵³ Hans-Peter Kaul, "The International Criminal Court: Current Challenges And Perspectives," Washington University Global Studies Law Review 6 (2007): 582; Hans-Peter Kaul, "Construction Site For More Justice: The International Criminal Court After Two Years," American Journal of International Law 99 (2005): 379-80.

²⁵⁴ Kaul, "Construction Site For More Justice: The International Criminal Court After Two Years," 379-80.

were a member of the ICC) to surrender American government or military personnel to the jurisdiction of the ICC.²⁵⁵ Although numerous states ultimately signed such agreements, Germany did go on record opposing them on the grounds that they appeared to undermine the court and state obligations to the court.

As with the evidence discussed in the prior section, these facts also support the idea that Germany did not commit to the court because of normative pressures. Instead, it continues to take an active and vocal leadership role in advocating the benefits of the court to others, even those that, like the United States, have been vocally opposed to the court. Indeed, during negotiations, and in connection with the bilateral immunity agreements, Germany repeatedly stood up to the United States.

Germany and the ICC: Assessing the Explanatory Power of the Credible Threat Theory

Based on the evidence outlined above, Germany's behavior in ratifying the Rome Statute is consistent with the credible threat theory and the argument that states that are more able to comply with treaty terms are also more likely to commit to treaties with strong enforcement mechanisms. In quickly committing to the ICC, Germany acted as one would expect for a state with consistently good human rights and rule of law ratings. Its ratings on both variables suggest that its costs of complying with the treaty will be minimal and that it will face little risk that its citizens will be hauled before the ICC in The Hague to be prosecuted for having committed mass atrocities. Thus, even if the ICC's enforcement mechanisms are as strong as they appear on paper, and even though they are relatively strong compared to the enforcement mechanisms associated with previous human rights treaties, Germany's costs of compliance are minimal.

²⁵⁵ Paul Meller, "EU exempts U.S. from war crimes trials," Chicago Tribune, October 1, 2002; Mark S. Ellis and Richard J. Goldstone, *The International Criminal Court: Challenges To Achieving Justice And Accountability In The 21st Century* (New York: The International Debate Education Association, 2008), 137.

Moreover, Germany has gone further to minimize that risk – and also acted in a way that suggests it does believe the ICC has the powers it appears to have on paper to haul perpetrators of mass atrocities before the ICC where the responsible state fails to act domestically – by passing the CCAIL. Germany has ensured that it has the national legal framework to allow it to domestically prosecute any mass atrocities in the event they occur.

Germany's behavior in connection with the creation of and commitment to the ICC is, of course, striking given Germany's history of human rights abuses and its earlier refusal to accept that the international community should be able to hold perpetrators of human rights abuses accountable for their actions. Following both of the World Wars, Germany clung fiercely to ideas of sovereignty and the right of a state to do as it pleased both without and within its territory. It passed discriminatory laws, it committed mass atrocities against its own people, and when confronted, it and its citizens appeared to take the position that the acts committed should not be subject to criminal sanction – particularly by the world community. Germany and its citizens particularly refused to accept the idea that its actions could violate international law where it had acted only against its own citizens – as where it carried out its policy to exterminate Jews within Germany.

But, those times have passed. This case study has shown that beginning in the 1960s, a new generation of younger Germans began playing a greater role in shaping state policy. This generation believed in protecting against human rights abuses and ending impunity for those that committed mass atrocities. The state provided resources to make the investigation of Nazi atrocities possible, and the new generation of prosecutors and judges actually had some success in holding Nazi perpetrators accountable for their actions. In the 1990s, with German reunification, Germany had even more reason to ensure that human rights abusers did not go

unpunished since it was German people who had suffered at the hands of Russians while under occupation. Thus, while German judges had previously accepted defenses of superior orders and non-retroactivity of criminal law, among others, in the 1990s, they instead found themselves concluding that state-sponsored crime would have to yield to justice and a respect for human rights. That the human rights ratings assigned to Germany by outside entities were also very high during the 1990s provides additional evidence that Germany had evolved into a state that respected and protected human rights.

Accordingly, an exogenous change in Germany's own practices and policies caused it to be the kind of state that would support a strong and independent ICC to which it promptly committed. Because by the time it participated in ICC negotiations and thereafter, Germany had good human rights practices and good domestic law enforcement institutions, Germany acted consistent with the credible threat theory and ratified the ICC treaty. Indeed, I argue that although compliance costs related to ICC treaty terms and the credible threat theory may not completely explain all aspects of Germany's behavior in committing to the Rome Statute, it better explains Germany's swift commitment to the ICC than do the other relevant theories. First, this is not a case where the credible commitment theory is even relevant, since at the time of ratification, Germany possessed – and it continues to possess – good human rights ratings. Second, normative theories similarly fail to explain Germany's ICC ratification behavior. For example, there is no evidence to suggest that Germany committed because of normative pressures. Instead, it was a leader, both internationally and regionally, in pushing for a strong and independent court and in encouraging others to commit to the court and abide by their obligations to comply with treaty terms. In addition, Germany willingly and vocally battled other powerful countries in pushing for its idea of a strong and independent court.

Furthermore, by committing to the court so promptly, Germany acted contrary to the predictions of some of the other rationalist view theories. For example, unlike other powerful nations with large military presences like the United States and China, Germany ratified the ICC treaty. And, by its negotiating presence and the fact that it passed domestic legislation codifying into its national laws the crimes covered by the ICC treaty, Germany obviously knew that the treaty covers war crimes. But, because its domestic human rights practices are good and because it has the domestic institutions and laws to enable it to prosecute any war crimes domestically, Germany could still act rationally in concluding the costs of ICC commitment would be minimal from a sovereignty standpoint. In addition, as discussed above, Germany promptly ratified the ICC treaty despite its difficult domestic ratification processes – and it did so by a unanimous vote of the legislature. Not only does this show that Germany’s support for the court expands well beyond the individuals who were engaged in ICC negotiations, but also it shows that the German government as a whole was well-aware of the commitment it was making by joining the court.

Finally, while Germany’s past and a desire to ensure that its state and citizens never again commit the atrocities they did during the Nazi era may explain some of Germany’s motivation for joining the ICC, theories about locking in state behavior for newly democratizing countries or for states that have recently experienced civil wars cannot explain Germany’s decision to ratify the ICC treaty. First, Germany was not a newly democratizing nation at the time it ratified the treaty. Nor had it very recently experienced civil wars or a situation where its government was inclined to respond violently in response to challenges to its power. Moreover, the evidence does not suggest Germany would have joined the court if its practices were not consistent with permitting immediate compliance with treaty terms. After all, even though its human rights and rule of law ratings were very high, Germany still acted swiftly to pass domestic legislation

criminalizing the exact conduct covered by the ICC treaty. It did so absent a requirement for implementing legislation and even though some states have concluded such legislation is not necessary.

Nevertheless, while Germany's behavior in ratifying the ICC treaty is consistent with the credible threat theory, case study analysis has identified other factors that – although consistent with the theory – also help in understanding Germany's behavior. In many ways Germany, by its actions in supporting a strong and independent court during negotiations and after ratification, has taken on a role that is beyond even what one might expect of a state with good human rights ratings and good domestic legal institutions. As to this point, the evidence does suggest that individuals – and in, particular Hans-Peter Kaul – may have played a role. Kaul was a leader in Germany's delegation in ICC negotiations from the very beginning. And, he is a person who shares his views about the importance of the ICC to the world community through his speaking engagements and written works. In fact, Claus Kress has credited Kaul as being instrumental in shaping Germany's new approach towards international criminal law.²⁵⁶ However, while the presence of Kaul may explain Germany's impetus to press for a court that was strong and independent or to support such a strong court, the evidence still shows that Germany committed to the ICC rationally and with knowledge that for it, ratification would pose few risks to its sovereignty.

²⁵⁶ Kress, "Germany and International Criminal Law: Continuity or Change?," in *The Nuremberg Trials: International Criminal Law Since 1945*, 239.

CHAPTER SEVEN

TRINIDAD AND TOBAGO: COMPLIANCE BEFORE NORMS

As noted above, because of a request by Trinidad and Tobago on the floor of the United Nations in 1989, the ILC commenced drafting a statute for the establishment of an international criminal court.²⁵⁷ By that request, then-Prime Minister Arthur N.R. Robinson proposed creating an international criminal court to address the growing problem of drug trafficking and to facilitate the prosecution of those involved in narcotics trafficking across national frontiers and other transnational criminal activities.²⁵⁸ Trinidad and Tobago continued to push for a court that would include narcotics trafficking within its jurisdiction throughout the years of negotiations leading up to the establishment of the court.²⁵⁹ It also focused its efforts on convincing other states that capital punishment should be included among the penalties that could be imposed upon persons convicted of crimes covered by the Rome Statute.²⁶⁰ In the end, however, both proposals were rejected: the ICC does not have jurisdiction over narcotics trafficking crimes, and the highest penalty the court can impose is life imprisonment. In fact, because the Rome Statute was adopted without the inclusion of the death penalty, and because the death penalty was extremely popular domestically, Trinidad and Tobago regretted that it “had to abstain in the vote for the adoption of the Statute” at the conclusion of the Rome Conference.²⁶¹

Yet, despite the fact that the ICC does not have jurisdiction over narcotics trafficking crimes and has no ability to impose the death penalty, Trinidad and Tobago promptly committed to the court. It signed the Rome Statute on March 23, 1999. It also became the second state to

²⁵⁷ Letter dated August 21, 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General, UN GAOR, 44th Sess., Annex 44, Agenda Item 152, UN Doc. A/44/195 (1989).

²⁵⁸ *Ibid.*

²⁵⁹ Press Release, L/2875, “Diplomatic Conference Begins Four Days Of General Statements On Establishment Of International Criminal Court,” June 16, 1998.

²⁶⁰ *Ibid.*

²⁶¹ Press Release L/2889, “UN Diplomatic Conference Concludes In Rome With Decision To Establish Permanent International Criminal Court,” July 20, 1989.

ratify the treaty (after Senegal) on April 6, 1999. Furthermore, by its post-ratification conduct, the country has acted as a strong supporter of the court. It has issued statements encouraging other states to join and also to comply with treaty terms. Moreover, further demonstrating its support for the court, and unlike some other States Parties, it refused to sign a bilateral immunity agreement with the United States even though by doing so, it lost important benefits.²⁶²

But, why would Trinidad and Tobago so promptly commit to the ICC given that the court that was created was not the one it envisioned – and needed – when it proposed an international criminal court in 1989? Why would it thereafter show support for the court? Of course, there is evidence that Trinidad and Tobago is normatively aligned with the court in that it appears to believe in international justice and seems to want to end impunity for those who commit international crimes. However, the very fact that Trinidad and Tobago so promptly and heartily committed to a court that did not fit its wants or needs suggests that something beyond normative concerns was motivating the country's behavior.

I suggest that although there are likely additional factors that led to Trinidad and Tobago's decision to ratify the Rome Statute, case study analysis supports the explanatory power of the credible threat theory. In short, the evidence shows that Trinidad and Tobago acted rationally and considered the relative strength of the ICC's enforcement mechanisms and its ability to comply with treaty terms in making its commitment decision. Statements by Trinidad and Tobago's own representatives show that the country guards its sovereignty, but that it committed to the court and continues to support it because it knows the court poses no real threat to its material interests. During debates in the Senate about a bill which was proposed to give effect to Trinidad and Tobago's obligations under the ICC treaty (the International Criminal

²⁶² Letta Tayler, "U.S. at odds over world tribunal: Bush administration suspends aid to nations that refuse to shield Americans from war-crimes court," *Newsday*, October 16, 2004.

Court Bill), one Senator explained:

The Bill does not infringe our sovereignty. The International Criminal Court will only become involved when our courts fail to bring to effective justice those individuals who have committed crimes that fall under the purview of the International Criminal Court. The statute would have the effect of putting pressure on our local jurisdiction to prosecute those brutal offenders, since our failure to do so will involve automatic involvement of the International Criminal Court in our jurisdiction.²⁶³

In addition, the idea that Trinidad and Tobago only would have committed to the ICC after concluding that commitment would not be against its material interests is supported by an examination of the country's behavior in connection with other human rights treaties. That evidence shows that Trinidad and Tobago carefully guards its sovereignty and does not commit to treaties that run counter to its domestic interests or with which it has no intention of complying. At present, for example, the country is only a party to the international human rights treaties with the weakest enforcement mechanisms that require self-reporting. In fact, it has not committed to the CAT – a treaty which by its terms has not specifically exempted imposition of the death penalty from the definition of “torture.” And although Trinidad and Tobago was briefly a member of the ICCPR Optional Protocol allowing for individual complaints, it withdrew from that treaty after a unique set of circumstances created a situation whereby committee and court actions began affecting the country's domestic death penalty policies in a way that it probably could not have anticipated when it joined.

In this case, the evidence shows that Trinidad and Tobago should not find compliance with the ICC treaty's terms difficult – meaning that it could commit to the treaty without fearing a significant loss of its sovereignty. First, the ICC treaty does not forbid states from imposing the death penalty domestically, and the country otherwise enjoys human rights ratings that

²⁶³ Trinidad and Tobago International Criminal Court Bill, Second Reading, Senate, Tuesday, November 29, 2005, 815. Parliamentary materials are available at <http://www.ttparliament.org/publications.php?mid=28&id=179>.

suggest its citizens will not commit the kinds of serious crimes that would be within the ICC's jurisdiction. Thus, as with Germany, this is not a case where the credible commitment theory could explain Trinidad and Tobago's ratification behavior inasmuch as it is a state with a recent history of good human rights practices and an absence of government-sponsored violence. For example, during the period between 1981 and 2008, Trinidad and Tobago has scored between 5 and 8 on the physical integrity rights scale. Also, since its independence from Great Britain in 1962, Trinidad and Tobago has been a liberal democracy, scoring between 8 and 10 on the democracy scale which ranges from 0 to 10. It has received a 10 on that scale since 1997.

Second, since its human rights practices are good, Trinidad and Tobago should still be able to comply with the ICC treaty even though its rule of law ratings are not strong²⁶⁴ and reports indicate the country's police and judiciary are underfunded and do not operate efficiently.²⁶⁵ Moreover, by passing the International Criminal Court Bill referenced above, the country has since improved its domestic law enforcement capabilities as they relate to ICC compliance: Trinidad and Tobago now has laws enabling it to prosecute the same crimes covered by the ICC domestically. In short, even though the ICC's enforcement mechanisms are relatively strong, since it should not expect that its government or citizens will commit mass atrocities, commitment to the ICC imposes relatively minimal sovereignty costs on Trinidad and Tobago.

This chapter proceeds by tracing Trinidad and Tobago's participation in the creation of the ICC, which participation culminates with its decision to promptly commit to the court. I then look at Trinidad and Tobago's behavior in connection with other international human rights

²⁶⁴ Trinidad and Tobago has received rule of law scores of between a high of approximately .5 and a low of approximately -.29 for the period from 1996 to 2008. Thus, its scores place it at about the mean of the sample – where the mean is -.065.

²⁶⁵ Amnesty International, Trinidad and Tobago 2009 Country Report (noting reports of shortages of judges and lawyers and concerns about the adequacy of the witness protection program).

treaties in an effort to generate a more complete picture of what factors influence its commitment decisions. Finally, in the conclusion to this chapter, I assess the credible threat theory and other competing theories in light of Trinidad and Tobago's behavior up to and following ratification of the Rome Statute and explore how and whether each is able to explain that behavior. Although the conclusions regarding the explanatory power of the credible threat theory to explain Trinidad and Tobago's decision to join the ICC are necessarily provisional, those conclusions are strengthened by the fact that the alternative explanations for state commitment to the ICC are less consistent with the data and the historical record.

The Proposal to Establish an International Criminal Court that Could Meet Trinidad and Tobago's Domestic Needs

The Impetus: The Narcotics Trafficking Problem in Trinidad and Tobago

Trinidad and Tobago's then-Prime Minister Arthur N.R. Robinson proposed establishing an international court to deal with the problems associated with international narcotics trafficking that were plaguing the small nation of Trinidad and Tobago (a nation of some 1.3 million citizens), as well as other countries in the Caribbean.²⁶⁶ Trinidad and Tobago lies just seven miles off the coast of Venezuela, and according to International Narcotics Control Strategy Reports ("INCSR") issued by the United States Department of State, even today it serves as a convenient transshipment point for cocaine, marijuana, and heroin.²⁶⁷ Although those reports are not available for the period preceding 1996, reports issued towards the end of 1990s shed some light on the nature of the narcotics trafficking situation in Trinidad and Tobago during the time period leading up to the creation of the court. For example, the 1997 INCSR for Trinidad and Tobago notes that the country was increasingly being targeted as a transit point for cocaine

²⁶⁶ Letter dated August 21, 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General, UN GAOR, 44th Sess., Annex 44, Agenda Item 152, UN Doc. A/44/195 (1989).

²⁶⁷ See the INCSR Reports for Trinidad and Tobago 1997-2010, available at <http://www.state.gov/p/inl/rls/nrcrpt/>.

destined for the United States and Europe because of the relative ease with which maritime and air traffic was able to enter the country with illicit cargo undetected – due in part to the country’s lack of money and equipment to aid in that detection. Many small boats were able to travel between Venezuela and Trinidad without inspection because Trinidad did not have a supply of serviceable coast guard boats. Low-flying aircraft could also enter at will because at the time, Trinidad and Tobago did not have radar capability to detect them. Smugglers also believed that it would be easier to conceal their illicit drugs given the large volume of cargo and human traffic that emanated from Trinidad and Tobago. Furthermore, they perceived that law enforcement would less vigorously scrutinize cargo originating from Trinidad and Tobago as opposed to a country that was known for producing illicit drugs. In terms of quantities, the Report estimates that up to 2000 kilograms of cocaine passed through Trinidad and Tobago every month.

Aside from the inability to detect and/or seize more than a small part of the narcotics traveling through the country, Trinidad and Tobago has also had difficulty dealing with other crimes that occur as a result of narcotics trafficking activities. Most significantly, the growing drug trade resulted in an increase in drug-related murders – of competing drug traffickers and of the witnesses who would testify against drug traffickers.²⁶⁸ For example, Trinidad and Tobago’s Attorney General Ramesh Maharaj reported that protecting witnesses had become one of its biggest problems in going after drug cartels. He explained that in response to the country’s crackdown on drug trafficking, some 14 or 15 key witnesses had been murdered in the five years preceding 1999.²⁶⁹ Indeed, frustrated with the growing level of violent drug-related crimes, in 1999, and despite the appeals of human rights groups, Trinidad and Tobago broke a five-year

²⁶⁸ Serge F. Kovaleski and Douglas Farah, “Organized Crime Finds New Target In Island Nations,” *South Florida Sun-Sentinel*, February 22, 1998.

²⁶⁹ Mark Fineman, “The Americas/A Weekly Look at People and Issues in Latin America/How to Hide Drug Witnesses/Caribbean island nations aim to beef up protection by sharing safe havens,” *Newsday*, January 31, 1999.

hiatus on implementing the death sentences of the prisoners held on its death row when it hanged nine members of Trinidad's notorious Dole Chadee gang.²⁷⁰ Apparently the star witness in the case against Chadee and his men (whose murder for which they were hanged) was found shot, hacked, and burned to death as soon as he left protective custody. The government only managed to convict the gang because the witness had previously recounted his testimony in a sworn affidavit.²⁷¹ The hangings were met with approval by the majority of this nation which opinion polls showed Trinidadians strongly supported as a deterrent to violent crime.²⁷²

Trinidad's Support for a Court with Jurisdiction over Narcotics Trafficking Offenses and with Authority to Impose the Death Penalty

Although official records show that Trinidad and Tobago generally sided with the like-minded group of states in backing a strong and independent court,²⁷³ in terms of its specific proposals, it was particularly interested in a court that would have jurisdiction over narcotics trafficking offenses and also the authority to impose the death penalty upon persons convicted of the crimes covered by the Rome Statute. For example, on June 16, 1998 during the Rome Conference, Trinidad and Tobago's Attorney General Ramesh Lawrence Maharaj made a plea for including "illicit trafficking of narcotic drugs across national frontiers and other transnational criminal activities" within the court's jurisdiction. He reasoned:

²⁷⁰Stephen Breen, *Trinidad Begins Executing Killers*, *The Scotsman*, June 5, 1999, available at 1999 WL 18798193.

²⁷¹Fineman, "The Americas/A Weekly Look at People and Issues in Latin America/How to Hide Drug Witnesses/Caribbean island nations aim to beef up protection by sharing safe havens."

²⁷²Tony Thompson, "No Mercy for Trinidad's Ruthless Gang Bosses: Caribbean Gallows Fever Reflects a Society Sick to Death of Violent Crime," *The Observer*, May 30, 1999, available at 1999 WL 13403710. Surveys in the 1990s show Trinidad's citizens were not alone in supporting the death penalty to deter violent crime. Apparently about 88 percent of the population in Barbados favored the death penalty; about 87 percent of Jamaicans supported it; and more than 70% of the population of Trinidad and Tobago supported the death penalty. Peter Richards, "Rights-Caribbean: Region Stands Firm on Death Penalty," *Inter Press Service*, June 9, 1999.

²⁷³Trinidad and Tobago was a member of the like-minded group from the beginning and backed proposals which favored granting the prosecutor powers to enhance his role and independence. "Preparatory Committee On International Criminal Court Discusses Power To Be Given Prosecutor," Press Release L/2778, April 4, 1996. Trinidad and Tobago also favored a limited role for the Security Council. "International Criminal Court Should Be Independent Body, And Not Subsidiary Of Security Council, Speakers Tell Legal Committee," Press Release, GA/L/3044, October 21, 1997.

The court's jurisdiction should be extended to internal armed conflicts. The illicit traffic in narcotic drugs is having devastating effects in the Caribbean region. Drug traffickers' actions ought to be regarded as a most serious crime of international concern.²⁷⁴

On the 14th of July, at the very conclusion of the Rome Conference, Trinidad again made its plea to include narcotics trafficking within the court's jurisdiction, this time by a formal proposal which it submitted together with Barbados, Dominica, India, Jamaica, Sri Lanka, and Turkey.²⁷⁵

During negotiations, Trinidad and Tobago also focused its efforts on convincing other states that capital punishment should be included among the penalties that could be imposed upon persons convicted of crimes covered by the Rome Statute. Joined by several other Caribbean and Arab governments, Trinidad and Tobago, in fact, insisted on publicly debating the idea despite knowing that the majority of states opposed the inclusion of the death penalty.²⁷⁶ Thus, on July 2, 1998, the country argued on behalf of 14 Caribbean states to include the penalty within the statute. It also emphasized that it would continue to apply the death penalty under its own domestic law whether or not the penalty was included within the ICC treaty.²⁷⁷

Ultimately, however, Trinidad and Tobago's proposals concerning both narcotics trafficking and the death penalty were rejected. As to the proposal to include narcotics trafficking within the crimes covered by the Rome Statute, most governments believed that the ICC's jurisdiction should be limited to the three core crimes of genocide, crimes against humanity, and war crimes. They argued, among other things, that limiting the number of crimes over which the court had jurisdiction would simplify negotiations and

²⁷⁴ "Diplomatic Conference Begins Four Days Of General Statements On Establishment Of International Criminal Court," Press Release, L/2875, June 16, 1998.

²⁷⁵ A/Conf. 183/C.1/L.71, Proposal Submitted By Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey (seeking to "[i]nset the crimes of terrorism and drug crimes as article 5(d) and (e)).

²⁷⁶ "Penalties: Conference Escapes Death Penalty Noose," On the Record, International Criminal Court, Volume 1, Issue 11, July 2, 1998.

²⁷⁷ Ibid.

lead to more broad-based support for the court.²⁷⁸ Some also argued that the crime of narcotics trafficking was best handled by national courts.²⁷⁹ By way of compromise, the parties agreed on a resolution to consider at a future Review Conference “the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”²⁸⁰

Trinidad and Tobago was granted no such compromise with respect to the death penalty issue, and it was that issue that apparently created questions about whether it would vote for the establishment of the ICC – even though it had proposed the idea of an international criminal court. Although Trinidad and Tobago had made clear during the debates that it would continue to apply the death penalty under its own domestic laws regardless of whether that penalty was included within the Rome Statute, it still faced the problem of a domestic population, more than 70% of whom supported capital punishment. By joining the ICC, it did not want to create the impression that it was opposed to the imposition of the death penalty for certain crimes. In fact, the death penalty remained so politically popular domestically that even as the debate about the death penalty proceeded during ICC negotiations, the government of Trinidad and Tobago was expediting procedures to execute several convicted murderers.²⁸¹

Ultimately, the question about whether Trinidad and Tobago would vote for the establishment of the court was answered in the negative: at the conclusion of the Rome Conference, it abstained in the vote for the adoption of the statute and referenced the failure of

²⁷⁸ 1995 Ad Hoc Committee Report, UN GAOR, 52nd Sess., Supp. No. 22 and 22A, UN Doc. A/51/22 (1995), ¶¶ 54, 81; Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the period 25 March-12 April 1996, UN Doc. A/AC.249/1, ¶63.

²⁷⁹ “Forget the Square Brackets, Go Back to Square One, Urges Trinidad and Tobago,” On The Record, ICC, Volume 1, Issue 2, June 16, 1998

²⁸⁰ Herman von Hebel and Darryl Robinson, “Crimes within the Jurisdiction of the Court,” in *The Making of the Rome Statute*, 87.

²⁸¹ “Trinidad in a Spot over Death Penalty,” *TerraViva: The Conference Daily Newspaper*, June 26, 1998, <http://www.ips.org/icc/tv260602.htm>.

the treaty to include the death penalty as punishment among the reasons for its abstention.²⁸²

Ratification of the ICC Treaty

Yet, as noted above, Trinidad and Tobago acted rather promptly to sign and ratify the Rome Statute, notwithstanding that the ICC that was created was not the international criminal court that Trinidad and Tobago needed or wanted. The country perceived itself as plagued by a narcotics trafficking problem that was imposed upon it by others. Because of its location near narcotics-producing states and its location near narcotics-consuming states, Trinidad and Tobago found its tiny nation overwhelmed by the problems associated with being a narcotics-trafficking transfer state. Because it was a small state without significant resources, it asked for the assistance of the international community to help it prosecute – and thereby deter – these international narcotics traffickers who were plaguing its small island community. But, even though the international community rejected Trinidad and Tobago’s plea to establish an international court to handle narcotics trafficking crimes, and even though the international community rejected its argument that the potential penalties imposed for serious international crimes must include the death penalty, Trinidad and Tobago committed to the ICC.

Research does not reveal any unequivocal answer as to how or why Trinidad and Tobago came to quickly ratify the Rome Statute despite the fact that the court did not include narcotics trafficking as a covered offense or the death penalty as an available sentence. But, the evidence does suggest a couple of explanations – all of which are consistent with the credible threat theory and the idea that Trinidad and Tobago’s commitment to the ICC would not impose significant sovereignty costs. Although it has been plagued by drug problems, Trinidad and Tobago should not expect its citizens to commit the kinds of mass atrocities that are within the jurisdiction of the

²⁸² “UN Diplomatic Conference Concludes In Rome With Decision To Establish Permanent International Criminal Court,” Press Release L/2889, July 20, 1989.

ICC. Rather, the state has relatively good human rights practices, and there is no evidence that its government is other than sincere in wishing to eradicate the problems posed by narcotics trafficking – through judicial, rather than extra-judicial, processes. Accordingly, while several additional factors may have contributed to Trinidad and Tobago’s decision to commit to the ICC, none of these additional factors or explanations lessen or detract from the explanatory power of the credible threat theory since the evidence still shows that based on retrospective calculations, commitment was both rational and relatively costless.

First, there is evidence that Trinidad and Tobago is not only normatively aligned with the court (as one might expect, given that it is a state with relatively good human rights practices), but also there is evidence that it believed it would have additional opportunities to try to shape the court according to its wishes. Statements by its leaders suggest that Trinidad and Tobago supports the idea of international justice and the idea of ending impunity for those who commit serious international crimes.²⁸³ Also, of course, by the compromise position adopted at the conclusion of the Rome Conference, Trinidad and Tobago was assured that it would be able to again raise the issue of including narcotics trafficking within the jurisdiction of the court. Trinidad and Tobago also suggested by a statement on October 21, 1998 – speaking on behalf of the Caribbean Community (CARICOM) – that it might be able to revisit the issue of the death penalty at a later date.²⁸⁴ Consequently, even though it is unlikely that Trinidad and Tobago

²⁸³ During parliamentary debates on the International Criminal Court Bill, legislators emphasized their pride that Trinidad and Tobago had played a role in creating a court which would be a “very powerful instrument to persecute and prosecute” those who have perpetrated international crimes of genocide, rape, and torture. Trinidad and Tobago International Criminal Court Bill, Second Reading, Senate, Tuesday, December 6, 2005, 847 (statement of Senator Dr. Jennifer Kernahan).

²⁸⁴ Trinidad and Tobago stated that although it was gratifying that the world community had adopted the Rome Statute for the creation of an international criminal court, it was disappointed that the treaty did not provide for jurisdiction over narcotics trafficking offenses or allow the imposition of the death penalty. But, it suggested both issues of concern to the Caribbean states could be revisited at a later date. It stated:

The issue of the death penalty should be revisited and included as a priority on the agenda of the first Review Conference. CARICOM was optimistic that at the first Review Conference, an

would be able to convince other countries to allow the ICC to impose the death penalty, it could still rationally believe – especially given the compromise position on narcotics trafficking – that it would have additional opportunities to shape the court according to its wishes.

Second, Trinidad and Tobago’s swift ratification of the Rome Statute was also likely influenced by the fact that it – and Arthur N.R. Robinson in particular – was responsible for bringing the idea of an international criminal court to the forefront of international discussions in 1989. Indeed, there is contemporary evidence that the Caribbean community was particularly proud of the role then-President Robinson played in creating the court. For example, by a Declaration dated March 18, 1999, the Caribbean states pledged their commitment to ensure the integrity of the Rome Statute and their commitment to pursue the process of ratification within the shortest possible time. The first acknowledgement in that Declaration specifically noted the role played by President Robinson in creating the court.²⁸⁵ In addition, Robinson himself seemed proud of the role he played in prompting the international community to move towards the creation of an international criminal court. In May 1998 before the Rome Conference, he stated that he considered this process of working towards the establishment of a strong, independent, and impartial International Criminal Court “to be perhaps the most important” in which he had or shall ever be engaged in the course of his lifetime.²⁸⁶ Accordingly, even though the court was not designed precisely as Trinidad and Tobago had wished, because commitment would not otherwise be costly given the country’s relatively good human rights practices, Trinidad and Tobago would have no reason to abandon a project it could claim to have had a role in creating.

acceptable definition would be drafted for the crime of illicit traffic in narcotic drugs and psychotropic substances. The draft definition submitted by CARICOM States at the Diplomatic Conference, with the support of many other States, could form the basis of those discussions.

A/C.6/53/SR.9, October 21, 1998.

²⁸⁵ Port of Spain Declaration on the International Criminal Court, March 18, 1999.

²⁸⁶ Statement by H.E. Arthur N.R. Robinson The President Of The Republic Of Trinidad And Tobago, May 1998.

Furthermore, although Trinidad and Tobago could have faced domestic opposition to joining a court that did not support the death penalty, it was able to minimize those costs. As noted above, Trinidad and Tobago suggested that it would continue to argue to include the death penalty among the punishments that could be imposed by the ICC. Since it made this argument on behalf of CARICOM, the government may also have made such an argument to its domestic audience. More significantly, however, the treaty ratification process allowed Trinidad and Tobago to minimize domestic ratification costs. Treaty ratification in Trinidad and Tobago requires no approval by the legislature. In addition, at the time of signing and ratification – March 23 and April 6, 1999, respectively – Arthur N.R. Robinson was the President of the Republic. Therefore, although research did not reveal any documents stating as much, it may have been that President Robinson was instrumental in getting Trinidad and Tobago to promptly commit to the ICC. Indeed, a search of Trinidad and Tobago’s parliament website did not reveal any Senate or House debates on the decision to commit to the court in the time period from the conclusion of the Rome Conference up until April 1999. Therefore, even though Trinidad and Tobago’s public may not have wanted the country to commit to a court that could not impose the death penalty, domestic ratification costs were minimized by the ease of the country’s ratification process.

Each of these explanations – while contributing to an understanding of why Trinidad and Tobago promptly joined the ICC despite the fact that the court as created was not the one it needed or wanted – is consistent with, and supportive of, the credible threat theory. Specifically, even though the ICC treaty contains relatively strong enforcement mechanisms, Trinidad and Tobago could expect that its sovereignty costs in joining the court would be minimal. Its human rights ratings are relatively good, and there is no evidence to suggest that the government

engages in or condones excessive violence: in fact, it supported the death penalty precisely because it wanted to deter the violent crimes that were occurring as a result of the narcotics-trafficking offenses that were plaguing the country. In addition, Trinidad and Tobago has never experienced a genocidal episode or a violent civil war, facts which further suggest it faces little risk that its citizens will be the subject of an ICC investigation. Moreover, unlike the United States, for example, Trinidad and Tobago does not have the kind of international military presence that could cause it to worry that its soldiers would be accused of committing war crimes. In terms of military expenditures, Trinidad and Tobago ranks in the bottom 10% of states, and a review of UN Peacekeeping records for December of every year between 2000 and 2009 shows that Trinidad and Tobago has not contributed any forces to such operations.

Therefore, although other facts – such as the ease of domestic treaty ratification processes – may have contributed to Trinidad and Tobago’s ability to swiftly ratify the Rome Statute – case study analysis supports the explanatory power of the credible threat theory. The evidence shows that Trinidad and Tobago would not suffer significant sovereignty costs by committing to the ICC treaty: it stated as much in the debates concerning the potential passage of the International Criminal Court Bill. That statement is particularly enlightening as to how Trinidad and Tobago viewed commitment to the ICC. Initially, Senator Parvatee Anmolsingh-Mahabir highlighted the normative significance of the ICC, arguing that he fully supports the bill and that the country must not be diverted in its “determination to prosecute and bring to justice those individuals who hide under the cover of a new state immunity to commit political crimes and atrocities of genocide, of crimes against humanity and war crimes.” He further stated that “[w]e cannot be made to subscribe to the outdated and immoral aspects of ‘victor justice.’” However, although the senator nodded his head to the normative importance of the ICC, his argument ultimately

rests on the fact that commitment to the ICC does not impose sovereignty costs. He specifically stated: “**The Bill does not infringe on our sovereignty.** The International Criminal Court will only become involved when our courts fail to bring to effective justice those individuals who have committed crimes that fall under the purview of the International Criminal Court.”²⁸⁷ Thus, the senator made clear that the costs of joining the ICC are not significant, and they are made even less significant by the fact that the country did pass the International Criminal Court Bill, thereby enabling national courts to prosecute any of the crimes covered by the ICC in the unlikely event that Trinidad and Tobago’s citizens ever committed such offenses.

Commitment to the International Human Rights Regime: A Focus on Compliance Costs

In addition, the idea that Trinidad and Tobago only would have committed to the ICC after concluding that commitment would not impose significant sovereignty costs or otherwise be against its material interests is supported by an examination of the country’s behavior in connection with other human rights treaties. That evidence also shows that Trinidad and Tobago carefully guards its sovereignty and is extremely calculating and strategic in making its decisions about whether to join human rights treaties. As can be seen from Table 21, at present, Trinidad and Tobago is not party to any of the treaties that impose additional enforcement mechanisms on states parties beyond reporting. In fact, it is not a party to the main Convention against Torture which only requires state reports. Thus, even where the enforcement mechanisms are weak – as with the CAT treaty – Trinidad and Tobago does not join treaties with which it does not intend to, or cannot, comply. Although Trinidad and Tobago has good human rights practices, it does impose corporal punishment, and it permits imposition of the death penalty as punishment for

²⁸⁷ Trinidad and Tobago International Criminal Court Bill, Second Reading, Senate, Tuesday, November 29, 2005, 815 (emphasis added).

certain crimes. For these reasons, and as discussed in more detail below, joining the CAT could impose significant sovereignty costs by affecting Trinidad and Tobago's ability to impose these punishments domestically.

Furthermore, although Trinidad and Tobago did join the Optional Protocol to the International Covenant on Civil and Political Rights in 1980, it ultimately denounced it on March 27, 2000 because of issues regarding how the Human Rights Committee's review of death row petitions was affecting the country's imposition of the death penalty domestically. The country similarly denounced the American Convention on Human Rights ("American Convention")²⁸⁸ because of the manner and timing of reviews of individual death row petitions by the Inter-American Human Rights Commission ("IAHRC") and the Inter-American Court of Human Rights ("IACtHR"). In both instances, Trinidad and Tobago denounced treaties imposing additional enforcement mechanisms – but only after events later showed that compliance with those treaties would impose significant sovereignty costs that it had not contemplated when it initially joined those institutions. That compliance costs were the reason Trinidad and Tobago denounced those treaties is evidenced from its own statements. It went on record stating that it would not be party to a regime with policies with which it had no intention of complying.²⁸⁹

²⁸⁸ American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, OEA/ser. L/V/II.34 doc. Rev. 2 (entered into force July 18, 1978), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, Signatures & Current Status of Ratifications of the American Convention, available at <http://www.cidh.oas.org/basic.htm>. The American Convention, like the ICCPR, defines and protects individual civil and political rights such as the right to humane treatment (Art. 5), the right to personal liberty (Art. 7), and the right to a fair trial (Art. 8).

²⁸⁹ In his article examining a theory of overlegalization of international human rights law and its relationship to state behavior, this is one inference Laurence Helfer suggests we can draw from Trinidad and Tobago's decision to denounce both the ICCPR Optional Protocol and the American Convention. Helfer notes that by following the formal denunciation procedures the treaties themselves authorized, rather than simply ignoring its treaty commitments, Trinidad and Tobago may have demonstrated its respect for the human rights regime. He, however, cautions that this interpretation should not be overstated inasmuch as Trinidad and Tobago had in the past refused to implement tribunal recommendations when it was party to the treaties. Laurence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes," *Columbia Law Review* 102 (2002): 1903.

Table 21: Commitment to the Six Primary International Human Rights Treaties

Treaty	Enforcement Mechanism	Date Open	Ratification Date
ICCPR	Reports	1966	1978
ICESCR	Reports	1966	1978
CERD	Reports	1966	1973
CEDAW	Reports	1980	1990
CAT	Reports	1984	--
CRC	Reports	1989	1991
ICCPR Art. 41	State Complaints	1966	--
CAT Art. 21	State Complaints	1984	--
ICCPR Opt.	Individual Complaints	1966	1980*
CERD 14	Individual Complaints	1966	--
CAT 22	Individual Complaints	1984	--
CEDAW Opt.	Individual Complaints	1999	--
CAT Opt.	Committee Visits	2003	--

Below, I address the country's death penalty and corporal punishment practices and discuss how those practices likely informed its decision to decline to ratify the CAT, but nevertheless to ratify the ICCPR Optional Protocol and the American Convention. I build on that discussion by tracing the events which culminated in Trinidad and Tobago's decision to denounce the ICCPR Optional Protocol and the American Convention. I conclude that Trinidad and Tobago's behavior in failing to commit to the CAT and in denouncing the other human rights treaties was the result of rational and strategic calculations. Trinidad and Tobago avoids international human rights treaties that are against its material interests and which significantly infringe on its sovereign rights to mete out justice as it deems appropriate.

Trinidad and Tobago's Death Penalty and Corporal Punishment Practices

Both capital and corporal punishment are lawful penalties for certain crimes in Trinidad and Tobago. For example, capital punishment was, and is, a legal sanction for murder in

Trinidad and Tobago – as well as in other English-speaking Caribbean nations.²⁹⁰ Moreover, as discussed above, imposing the death penalty as punishment for murder has enjoyed substantial popular support in the country as a desired means in which to deter the violent acts that accompany narcotics trafficking offenses. Trinidad and Tobago also has a history of supporting the use of corporal punishment, including flogging and caning. Pursuant to the Corporal Punishment Act of 1953, a court may order any male offender over the age of eighteen years to be struck or flogged with a “cat-o-nine tails” if he has been convicted of certain crimes, such as rape. Prior to its amendment in 2000, that same Act permitted flogging of male offenders over the age of sixteen.

On the other hand, although the death penalty and corporal punishment are still lawful in Trinidad and Tobago, neither is frequently imposed. A review of Amnesty International Country reports indicates that the country has not actually carried out an execution since the Chadee hangings in 1999.²⁹¹ In addition, according to a 2005 Amnesty International Report, the government of Trinidad and Tobago stated that judicial corporal punishment had not been imposed since 2002.²⁹² News searches, however, indicate that courts have imposed birch caning for sexual offenses and murder between 2006 and 2009.²⁹³

Trinidad and Tobago’s Refusal to Ratify the Convention Against Torture

Nevertheless, even if the death penalty and corporal punishment are not frequently imposed, Trinidad and Tobago’s preference for continuing to have both punishments on its law

²⁹⁰ Joanna Harrington, “The Challenge To The Mandatory Death Penalty In The Commonwealth Caribbean,” *American Journal of International Law*, 98 (2004): 128.

²⁹¹ Amnesty International, “Trinidad and Tobago: First Execution in 10 Years Threatened,” AMR/ 49/001/2009.

²⁹² Amnesty International, “Amnesty International Report 2005 - Trinidad and Tobago,” May 25, 2005, available at <http://www.unhcr.org/refworld/docid/429b27f920.html>.

²⁹³ Keino Swamber, “Twelve Strokes for Sex with Girl, 12” *Trinidad & Tobago Express*, June 1, 2006, available at <http://corpun.com/ttj00606.htm#19099>; Keino Swamber, “25 years, 10 strokes for cutlass attack,” *Trinidad and Tobago Express*, May 30, 2009, available at <http://corpun.com/ttj00905.htm>.

books likely explains the country's strategic and rational decision to commit to, refuse to commit to, or withdraw from certain human rights treaties. First, regarding Trinidad and Tobago's decision to refuse to commit to the CAT, both the language of the treaty and statements by the Committee Against Torture provide evidence showing that commitment to that treaty may impose significant sovereignty costs that the country would not wish to assume given its domestic penalty preferences. The CAT – unlike the ICCPR and the American Convention – does not explicitly exempt from the definition of torture the lawful, and already established, imposition of the death penalty. In addition, the Committee Against Torture has stated that it considers corporal punishment to constitute torture, even when national legislation permits such punishment.²⁹⁴

A comparison of the language of the three treaties as relates to prohibitions on torture serves to illustrate the point about the relative costliness of commitment to the CAT for a state like Trinidad and Tobago which favors the possibility of imposing the death penalty as a lawful sanction. Each of the CAT, the ICCPR, and the American Convention prohibits torture, or cruel, inhuman, or degrading treatment or punishment.²⁹⁵ However, the language of the CAT treaty – in contrast to that of the ICCPR and the American Convention – does not specifically address the death penalty and acknowledge that states can impose it as punishment for serious crimes without running afoul of treaty terms. For example, Article 6, paragraph 2, of the ICCPR provides:

In countries which have not abolished the death penalty, sentence of death may be

²⁹⁴ Committee Against Torture, Concluding Observations on Namibia, May 6, 1997, UN Doc. A/52/44, ¶¶ 227-252; Committee Against Torture, Concluding Observations on Saudi Arabia, June 12, 2002, UN Doc. CAT/C/CR/28/5, ¶ 4(b).

²⁹⁵ ICCPR, Art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”); American Convention, Art. 5 (“No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”)

imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

Article 4, paragraph 2, of the American Convention similarly provides:

In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

Therefore, although the ICCPR and the American Convention ostensibly prohibit the same conduct as the later-enacted CAT, those treaties also make clear that states can legally impose the death penalty domestically without violating the treaty – whereas the CAT does not. Accordingly, because the CAT treaty did not expressly exempt from its definition of torture the lawful imposition of the death penalty, Trinidad and Tobago would understand that commitment to that treaty could prove costly as it would interfere with the country's sovereign right to impose a lawful penalty for certain crimes that it deemed deserving of such punishment.

Commitment to, and Denunciation of, the ICCPR Optional Protocol and the American Convention

While there is no absolute evidence proving why Trinidad and Tobago has refused to commit to the CAT, the record is replete with evidence demonstrating that Trinidad and Tobago's denounced the ICCPR Optional Protocol and the American Convention for strategic and rational reasons related to its preference for continuing to be able to lawfully impose the death penalty. Indeed, the evidence shows that even though those treaties contained additional enforcement mechanisms, Trinidad and Tobago was rational in committing to them because, as the treaty language set out above shows, both explicitly exempted from the definition of torture

the lawful imposition of the death penalty. Trinidad and Tobago was equally rational and strategic in deciding to denounce both treaties when events transpired so as to impose a threat to its domestic penalty regime that it could not have foreseen when it initially committed to those treaties.

By way of background, Trinidad and Tobago ratified the ICCPR in 1978. Thereafter, in 1980, it ratified the ICCPR Optional Protocol, by which it agreed that individuals could bring complaints against it alleging violations of treaty terms before the Human Rights Committee. The country also committed to the American Convention – which is a regional treaty modeled on the ICCPR – in 1991. Parties to the American Convention are automatically subject to the jurisdiction of the IAHRC, a body which, like the Human Rights Committee, is only permitted to make findings and issue nonbinding recommendations to the governments accused by individuals of violating treaty terms. In addition, however, in 1991, Trinidad and Tobago voluntarily recognized the jurisdiction of the IACtHR. Although individuals cannot directly petition the IACtHR, the Commission has the option of referring to it any petitions it has been unable to settle amicably. By the terms of the American Convention, the IACtHR is empowered to interpret the treaty’s provisions and issue legally binding decisions on the cases before it as to any state that has recognized its jurisdiction.²⁹⁶

To understand why Trinidad and Tobago took the unusual step of later denouncing the ICCPR Optional Protocol and the American Convention, one must first understand how the country’s death penalty practices were affected by its death penalty review process and also its membership in these two treaties allowing for individual complaints. First, and despite its independence from Great Britain in 1962, Trinidad and Tobago – like other Caribbean nations – retains as its highest court of appeal the London-based Judicial Committee of the Privy Council

²⁹⁶ American Convention, Art. 1.

(the “Privy Council”).²⁹⁷ Thus, although the death penalty is a lawful punishment in Trinidad and Tobago, persons sentenced to death were able to appeal their convictions to the Privy Council. However, it was not until 1993, and the Privy Council’s decision in *Pratt v. Attorney General for Jamaica* that the Privy Council’s review of death penalty convictions posed a problem for Trinidad and Tobago.²⁹⁸ In *Pratt*, the Council held that carrying out a capital sentence after a five-year delay not the fault of the accused would be in contravention of a constitutional provision against cruel, inhumane, and degrading punishment. Notably, delays resulting from domestic appeals processes (including to the Privy Council) and petitions to international human rights bodies were to be included in calculating the five-year time period. Therefore, the Privy Council held that any death sentences for which the appeals and petition processes were not concluded within five years must be commuted to life imprisonment.²⁹⁹ As a result of the *Pratt* ruling, all Caribbean jurisdictions which had prisoners on death row in excess of five years were required to commute those sentences to life imprisonment. Trinidad and Tobago immediately commuted the death sentences of fifty-three death row inmates.³⁰⁰

Not only did the *Pratt* decision cause Trinidad and Tobago to commute sentences of its death row inmates, but it also tied the country’s ability to carry out its domestic death penalty policies to the timeliness of the review processes of the Human Rights Committee and the

²⁹⁷ In February 2001, eleven Caribbean states finalized an agreement to create a Caribbean Court of Justice to act as the region’s highest court of appeal in lieu of the Privy Council. Although the Caribbean Court of Justice was created in 2005, at present it appears that the Privy Council still functions as Trinidad and Tobago’s highest court of appeal. “Privy Council’s Complaint,” BBCCaribbean.com, Sept. 24, 2009, http://www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml

²⁹⁸ In fact, in *De Freitas v. Benny*, [1976] A.C. 239 (P.C. 1975), the Privy Council had upheld the government’s right to impose the death penalty for murder, holding that the imposition of the death penalty was not *per se* cruel and unusual punishment.

²⁹⁹ *Pratt v. Attorney General for Jamaica*, [1994] 2 A.C. 1, 33-36 (P.C. 1993). Indeed, the Privy Council stated: If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.

³⁰⁰ Helfer, “Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes,” 1872; Glenn McGrory, “Reservations of Virtue? Lessons from Trinidad and Tobago’s Reservations to the First Optional Protocol,” *Human Rights Quarterly*, 23 (2001): 777. Article 5 of the Constitution for Trinidad and Tobago prohibits cruel and unusual treatment or punishment.

IACtHR. And, those review processes apparently were not quick to conclude since the tribunals had crowded dockets and were also part-time bodies that met only a few times per year.³⁰¹ In addition, after the *Pratt* decision, capital defendants increased the number of death row petitions they filed before both the Human Rights Committee and the IAHRRC.³⁰²

While Trinidad and Tobago did make efforts to address the timing of international petition processes, its efforts in that regard were not successful. For example, in 1995, Caribbean governments sought relief from the Privy Council, arguing that “either the periods of time relating to applications to the human rights bodies should be excluded from the computation of delay or the period of five years should be increased to take account of delays normally involved in the disposal of such complaints.”³⁰³ The Privy Council rejected this argument even though Barbados threatened to denounce the ICCPR Optional Protocol in the absence of a time extension.³⁰⁴ In addition, in August 1997, Trinidad and Tobago unilaterally issued instructions to the Human Rights Committee and the IAHRRC requiring that these bodies complete their review process in approximately 7 months.³⁰⁵ The Human Rights Committee, however, immediately rejected the imposition of time limits, stating that time limits “cannot be invoked as justification for any measure that would deviate from the Covenant, the Optional Protocol, or requests by the Committee for interim measures of protection.”³⁰⁶ Thus, as a result of the Privy Council’s decision, Trinidad and Tobago was effectively banned from imposing the death penalty domestically: by invoking domestic and international review mechanisms, capital defendants were able to force the country to commute their sentences to life imprisonment.

³⁰¹ Helfer, “Overlegalizing Human Rights,: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes,” 1873.

³⁰² Ibid. at 1875.

³⁰³ *Bradshaw v. Attorney General of Barbados*, [1995] 1 W.L.R. 936, 941 (P.C. 1995).

³⁰⁴ Ibid.

³⁰⁵ McGrory, “Reservations of Virtue? Lessons from Trinidad and Tobago’s Reservation to the First Optional Protocol,” 778 and n. 41.

In 1998, after its efforts in seeking relief from the *Pratt* decision were soundly thwarted, Trinidad and Tobago took the unusual step of denouncing its treaty obligations under the ICCPR Optional Protocol and the American Convention.³⁰⁷ First, on May 26, 1998, Trinidad and Tobago denounced the ICCPR Optional Protocol and then re-acceded with a reservation that makes clear that its concerns with being a member of the treaty related to its being able to carry out its domestic penalty regime. The reservation stated:

Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith.

Accepting the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Trinidad and Tobago stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Trinidad and Tobago and subject to its jurisdiction the rights recognized in the Covenant (in so far as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof.

However, in a December 1999 decision, the Human Rights Committee declared that the reservation was severable from the country's decision to re-accede to the treaty since it was incompatible with the object and purpose of the Optional Protocol.³⁰⁸ It stated that it could not "accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the

³⁰⁷ Jamaica was the first country to denounce the ICCPR Optional Protocol in October 1997. Natalia Schifferin, "Jamaica Withdraws The Right Of Individual Petition Under The International Covenant On Civil And Political Rights," *American Journal of International Law* 92 (1998): 563.

³⁰⁸ *Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, U.N. GAOR, Human Rights Committee, 55th Sess., Supp. No. 40 vol.2, at 266, UN Doc. A/55/40 (1999).

population.”³⁰⁹ In response, on March 27, 2000, Trinidad and Tobago denounced the ICCPR Optional Protocol – this time, in its entirety.

As to the American Convention, Trinidad and Tobago notified the Secretary General of the Organization of American States that it was withdrawing its ratification of that treaty on May 26, 1998.³¹⁰ Again, Trinidad and Tobago made clear that its reasons for withdrawing from the treaty related to the threat that treaty commitment was posing to its sovereign right to enforce its domestic lawful penalty regime. Trinidad and Tobago argued that because the Inter-American Commission on Human Rights could not expedite petitions in death penalty cases, the result was that persons sentenced to capital punishment in its country would be subjected to cruel and unusual punishment because of the delay in implementing that punishment in contravention of Article 5(2)(b) of the country’s constitution. It further noted that it would not “allow the inability of the Commission to deal with applications in respect of capital cases expeditiously to frustrate the implementation of the lawful penalty for the crime of murder in Trinidad and Tobago.”³¹¹ Pursuant to the terms of the American Convention, the withdrawal became effective one year later.³¹²

In sum, Trinidad and Tobago’s decisions to denounce the ICCPR Optional Protocol and the American Convention were based on rational and strategic calculations regarding the costliness of treaty commitment. The country joined both treaties – notwithstanding their stronger enforcement mechanisms – rationally believing that neither treaty would threaten its domestic penalty regime. Indeed, both treaties expressly exempted from their definitions of

³⁰⁹ Ibid.

³¹⁰ Trinidad and Tobago: Notice to Denounce the American Convention on Human Rights (May 26, 1998), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, Signatures & Current Status of Ratifications of the American Convention, OAS/ser.L/V/I.4, doc. Rev. 7, <http://www.cidh.oas.org.basic.htm>.

³¹¹ Ibid.

³¹² American Convention, Art. 78.

torture the lawful imposition of the death penalty by states that already had that penalty enshrined in domestic law. And, it was only because of the Privy Council's 1993 decision requiring that death sentences be carried out within five years that Trinidad and Tobago became aware that its treaty obligations would interfere with its domestic death penalty practices. Moreover, it only denounced the treaties after the bodies that could consider individual death row petitions refused to commit to concluding their reviews of those petitions promptly enough so that Trinidad and Tobago could carry out its death sentences within the five-year period. Even then, it did not fully denounce the ICCPR Optional Protocol until its reservation carving out only death row petitions was rejected by the Human Rights Committee. Only when events transpired to change the costliness of its treaty commitments in a way that Trinidad and Tobago could not have foreseen when it entered into the treaties did it make a calculated decision to denounce them.

Trinidad and Tobago and the ICC: Assessing the Explanatory Power of the Credible Threat Theory

Trinidad and Tobago's behavior in ratifying the ICC treaty is consistent with the credible threat theory and the idea that states that are more able to comply with treaty terms are also those that are more likely to commit to treaties with strong enforcement mechanisms. The evidence shows that Trinidad and Tobago acts rationally and retrospectively calculates compliance costs when determining whether or not to join international human rights treaties. For example, the country refused to join the CAT treaty. It also denounced the ICCPR Optional Protocol and the American Convention when later events (which Trinidad and Tobago could not have anticipated at the time it joined those treaties) showed that its continued commitment would significantly impinge on its domestic penalty regime.

In this case, however, commitment to the ICC should pose no significant sovereignty costs on Trinidad and Tobago – a fact which its own representative emphasized when supporting the passage of the International Criminal Court Bill. Trinidad and Tobago’s human rights ratings are, and have been, relatively high, and it otherwise has no reason to believe its citizens would commit the kinds of mass atrocities covered by the ICC treaty. Furthermore, it is not a country that has experienced genocidal episodes in the past, nor has it experienced civil wars. The country does have a problem with narcotics trafficking and associated crimes like murders, but those are not crimes covered by the ICC treaty. Furthermore, as to the death penalty and corporal punishment, the death penalty is not illegal under international law, and it is not made a crime by the terms of the ICC treaty. And, while some international human rights bodies have concluded that flogging can constitute torture, even that penalty – which is imposed for rape and similar crimes – would not constitute a crime covered by the ICC treaty. The Rome Statute makes torture a crime only in the context of war crimes or crimes against humanity. Because Trinidad and Tobago does not participate in international wars or in United Nations Peacekeeping efforts, its citizens are unlikely to commit war crimes. Moreover, occasional judicially imposed floggings should not rise to the level of a crime against humanity, which requires a systematic attack against a civilian population.

That Trinidad and Tobago has relatively weak domestic law enforcement institutions does not mean that it is unable to comply with the terms of the ICC treaty. The quality of a country’s law enforcement institutions is a component of ICC compliance, but domestic institutional capabilities are less relevant in this case because Trinidad and Tobago would not expect its citizens to commit the kinds of mass atrocities covered by the Rome Statute. Again, the evidence from parliamentary debates shows that Trinidad and Tobago believes that its

commitment to the ICC will not result in a loss of sovereignty – since it can avoid ICC prosecutions if its citizens do not commit mass atrocities. Furthermore, in February 2006, Trinidad and Tobago passed the International Criminal Court Bill, thereby making provision for the punishment of certain international crimes: namely, genocide, crimes against humanity and war crimes. By passing the Act, not only did Trinidad and Tobago demonstrate that it views the ICC's enforcement mechanisms as a credible threat, but it also took steps to minimize its sovereignty costs by ensuring that it could prosecute domestically any crimes covered by the ICC's terms.³¹³ Accordingly, even if Trinidad and Tobago's domestic legal institutions are weak, the country's ability to prosecute mass atrocities is now stronger than it was previously.

Although compliance costs related to ICC treaty terms and the credible threat theory may not completely and definitively explain why Trinidad and Tobago committed to the ICC, I suggest that the theory is more explanatory than others that have been offered to explain state commitment to international human rights regimes. First, and like Germany, because Trinidad and Tobago has good human rights practices and no recent history of government-sponsored violence, this is not a case where the credible commitment theory can explain its ratification behavior. Similarly, this is not a case where the evidence suggests the country is committing in order to lock-in democracy or tie itself to a regime that will deter it from committing violent acts against its citizens. Trinidad and Tobago has been a democracy since its independence in 1962, and no evidence suggests its government has ever acted violently against its citizenry.

Nor does the evidence suggest that Trinidad and Tobago ignored rational concerns and committed to the ICC because of normative pressures. It proposed the idea of an international criminal court, and it was the second state to join the court.

It is true that since joining the court, Trinidad and Tobago has acted in ways that

³¹³ International Criminal Court Act, ¶ 3.

demonstrate its commitment to the court and its goals, but these acts do not detract from the explanatory power of the credible threat theory since the facts still show that the country committed to the ICC based on rational and retrospective calculations regarding sovereignty costs. For example, Trinidad and Tobago publicly refused to sign a bilateral immunity agreement with the United States, a decision which did cost it \$450,000 in funding for its coast guard.³¹⁴ However, although this decision was costly, it did not make commitment to the ICC more costly in terms of Trinidad and Tobago's sovereign rights to conduct its internal affairs as it saw fit. It entailed only a loss of aid and assistance. Furthermore, it was a cost of ratification that Trinidad and Tobago could not have anticipated in 1999 when it ratified the Rome Statute. The Bush Administration – not the Clinton Administration which was in office when the Rome Statute was adopted – instituted the policy of pursuing bilateral immunity agreements. And, the Bush Administration only started seeking those agreements at about the time the court became a reality – in July 2002.³¹⁵ Accordingly, at the time it ratified the ICC treaty, Trinidad and Tobago would not have been able to calculate these additional costs of joining the court, and in any event, these additional costs still did not impinge on its sovereignty.

In addition, although Trinidad and Tobago's refusal to sign a bilateral immunity agreement did make its ICC commitment more costly from an aid perspective, Trinidad and Tobago worked to minimize those costs – further demonstrating that it is a country that acts rationally and strategically to minimize its costs of commitment. By United States law, military assistance would not be withdrawn for states that refused to sign a bilateral immunity agreement until July 2003. Furthermore, the President had the authority to waive any withdrawal of

³¹⁴ Letta Tayler, "U.S. at odds over world tribunal: Bush administration suspends aid to nations that refuse to shield Americans from war-crimes court," *Newsday*, October 16, 2004.

³¹⁵ Human Rights Watch, "Bilateral Immunity Agreements," June 3, 2003, 2-3, <http://www.iccnw.org/documents/HRWBIAJune03.pdf>.

military to any countries if he deemed it in the national interest to do so.³¹⁶ In 2003, even while Trinidad and Tobago was standing firm on its intention to refuse to sign a bilateral immunity agreement, it was also seeking to persuade the United States President that it and other Caribbean nations were effectively a “Third Border,” which they alone could not protect and which was critical to the national interest of the United States.³¹⁷ Trinidad and Tobago was not initially successful in seeking a waiver. But, by 2006, the United States eventually cleared a block on military assistance to Trinidad and Tobago and to other countries that had not signed bilateral immunity agreements.³¹⁸ Therefore, unlike with the ICCPR Optional Protocol and the American Convention, the later events concerning the bilateral immunity agreements never imposed additional domestic sovereignty costs on Trinidad and Tobago. Moreover, the threat to Trinidad and Tobago’s ability to receive military aid were resolved relatively quickly, such that the country’s initial ratification decision remained relatively costless in any event.

Nor does the fact that Trinidad and Tobago advocates for the court and encourages other countries to commit and comply detract from the explanatory power of the credible threat theory. For example, in a statement issued on November 15, 2008 during an Assembly of States Parties, Trinidad and Tobago encouraged other countries to join the court and also to comply with treaty terms by, for example, enacting domestic implementing legislation and cooperating with the court in the execution of arrest warrants, the surrender of accused persons, and the protection of witnesses.³¹⁹ It made a similar statement during the 2010 Review Conference in Kampala. Again, it called on states to enact legislation to give domestic legal effect to the provisions of the

³¹⁶ Human Rights Watch, “Bilateral Immunity Agreements,” June 3, 2003, 2-3, <http://www.iccnw.org/documents/HRWBIAJune03.pdf>.

³¹⁷ “Trinidad's premier to bring up Caribbean concerns on US visit,” The British Broadcasting Company, August 3, 2003.

³¹⁸ Country Report Aruba December 2006, “The Region: Caricom presses US to discuss important issues for the region,” December 8, 2006, available at 2006 WLNR 24286918.

³¹⁹ Statement by Mr. Keith De Freitas, Trinidad and Tobago, November 15, 2008.

Rome Statute and also to execute outstanding arrest warrants.³²⁰ But, Trinidad and Tobago has committed to the ICC, and it makes sense that it would stand by that commitment, particularly since as noted above, there is evidence that Trinidad and Tobago is normatively aligned with the court's ideas and principles. In fact, its normative alignment and its relatively good human rights practices serve to support a conclusion that its commitment to the ICC would be relatively costless from a sovereignty standpoint.

Of course, although none of these other theories explain Trinidad and Tobago's behavior, one cannot ignore the role that Arthur N.R. Robinson played in making the country's support for, and ratification of, the court possible. Furthermore, national pride in the country and its leader's role in creating the court may help to explain the swift ratification and the later efforts to comply with and support the ICC. These additional factors leading to Trinidad and Tobago's commitment, however, do not lessen or detract from the explanatory power of the credible threat theory. Instead, by the case study method, we are able to better understand Trinidad and Tobago's decision to commit to the ICC. In particular, the presence of Robinson and national pride help explain the impetus for the decision, its timing, and the strength of the country's commitment to it. Simply put, the presence of Robinson may have made Trinidad and Tobago's commitment to the ICC more prompt or stronger than it otherwise would have been, but the evidence still shows that the country ratified the treaty rationally and strategically knowing that it could and would comply with treaty terms.

Finally, an examination of the country's prior actions with respect to other human rights treaties only serves to further demonstrate the explanatory power of the credible threat theory as it relates to Trinidad and Tobago's decision to join the ICC. It joined treaties with weak

³²⁰ Statement by H.E. Patrick Edwards, High Commissioner for The Republic of Trinidad and Tobago at the Review Conference of the Rome Statute of the International Criminal Court Kampala, Uganda, May 31, to June 11, 2010.

enforcement mechanisms, except for the CAT with which it knew it could not comply because of its domestic laws allowing for the death penalty. And, it denounced two treaties with stronger enforcement mechanisms after circumstances it could not have known about at the time of ratification would affect its domestic policies in a way it could not have envisioned. One should expect that Trinidad and Tobago learned from that experience not to take its commitments to treaties with stronger enforcement mechanisms lightly. More importantly, in this case, because the terms of the ICC treaty address only mass atrocities and because the evidence suggests that Trinidad and Tobago's citizens will not commit those crimes, the country could rationally conclude that commitment would not impose significant sovereignty costs.

CHAPTER EIGHT

RWANDA: CREDIBLE THREAT, NOT CREDIBLE COMMITMENT

By contrast to the earlier case study chapters which examined ratification decisions of states with good human rights practices and at least average domestic law enforcement institutions, this chapter examines the ratification decision of Rwanda – a state with poor human rights practices and poor institutions. Although Rwanda did send delegates to the Rome Conference, and although Rwanda's Minister of Justice stated his support for the establishment of an international criminal court to help eradicate genocides like that experienced in Rwanda, Rwanda nevertheless has not joined the ICC.³²¹ In fact, it neither signed the ICC treaty nor ratified it.

Rwanda's failure to readily commit to the ICC is consistent with theoretical expectations because the data suggest that its costs of complying with the ICC treaty and the risks to its sovereignty should it join the ICC are significant. First, Rwanda has experienced a recent and horrendous genocidal episode. Over several months in 1994, the Hutu majority killed approximately 800,000 Tutsi men, women, and children. Also, even since the genocide, Rwanda's human rights ratings have remained quite poor. Between 1994 and 2007, Rwanda has most frequently scored either a 2 or 3 on the physical integrity rights scale, although only very recently in 2005, it scored a 5 on the scale. Furthermore, in recent decades, Rwanda has consistently received a 0 on the democracy scale which ranges from 0 to 10.

In addition to having a history of genocide and poor human rights practices, Rwanda also appears to lack the kinds of institutions that would enable it to fairly and capably prosecute mass atrocities domestically. Between 1996 and 2008, Rwanda's rule of law ratings have ranged

³²¹ Statement of Faustin Ntezilyayo, Minister of Justice of Rwanda, United Nations Press Release L/2881, June 17, 1998.

between -1.49 and -.250. Other anecdotal evidence also indicates that Rwanda's judicial capacity is weak. While Rwanda's judicial system has apparently been improving, criticisms concerning Rwanda's ability to fairly prosecute persons who allegedly committed genocide during 1994 caused the International Criminal Tribunal for Rwanda ("ICTR") to refuse to transfer cases to Rwanda for prosecution.³²² As recently as 2008, Human Rights Watch argued that Rwanda's justice system is seriously flawed in "areas such as judicial independence, the right to present a defense, and the right to equal access to justice for all."³²³ In addition, Human Rights Watch, among others, has criticized Rwanda for failing to dispense equal justice, arguing that it has failed to prosecute senior officers of RPF forces (the rebel forces who succeeded in ending the genocide) who allegedly murdered and committed other serious crimes against Hutus because of their role in the genocide.³²⁴ Moreover, Rwanda's government has been accused of obstructing and hindering the ICTR's potential prosecution of those RPF soldiers.³²⁵

³²²For example, in *Prosecutor v. Gatete*, Case No. ICRT-2000-61-R11bis (Nov. 17, 2008) ¶ 95, the ICTR Trial Chamber denied the ICTR prosecutor's request to transfer defendant Jean-Baptiste Gatete to Rwanda for trial, stating that it was not satisfied the defendant would receive a fair trial if transferred. It noted concerns that the defendant would not be able to call witnesses residing outside Rwanda and that the defense would have difficulty obtaining witnesses in Rwanda because they would be afraid to testify. The court further noted the risk that the defendant would be sentenced to life imprisonment in solitary confinement. Although it has praised Rwanda's progress in being able to provide for fair trials, the ICTR Appeals Chamber has nevertheless upheld several other Trial Chamber decisions denying the ICTR prosecutor's request to transfer certain cases to Rwanda for trial. In doing so, it similarly referenced concerns about the defense's ability to call witnesses and the available penalties that might be imposed in Rwanda if the defendant was convicted. See *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11bis (Dec. 4, 2008) ¶40; *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis (Oct. 30, 2008) ¶ 35; *Prosecutor v. Munyakazi*, Case No. ICTR-96-36-R11bis (Oct. 8, 2008) ¶ 50.

³²³ Human Rights Watch, "Rwanda: Progress in Judicial Reforms Falls Short: Technical Advances, but Insufficient Fair Trial Guarantees," July 25, 2008, available at <http://www.hrw.org/en/news/2008/07/23/rwanda-progress-judicial-reforms-falls-short?print>.

³²⁴ For example, in August 2009, Human Rights Watch reported that Rwanda has only prosecuted some 32 lower-level RPF soldiers for the conduct in 1994 and that most also received "relatively lenient punishments." The organization further noted that the soldiers were tried for "ordinary crimes," rather than war crimes or crimes against humanity. Human Rights Watch, "Letter to ICTR Chief Prosecutor Hassan Jallow in Response to His Letter on the Prosecution of RPF Crimes," August 14, 2009, available at <http://www.hrw.org/en/news/2009/08/14/letter-ict-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime?print>.

³²⁵ "Rwanda: Academic Scholars Call for ICTR to Fulfill Mandate and Prosecute RPF/RPA Members," World News Journal, June 1, 2009 (noting that the ICTR stopped moving to prosecute RPF soldiers after Rwanda responded by preventing prosecution witnesses from traveling to the ICTR to testify at trials in its cases against Hutus). On the other hand, the ICTR prosecutor has responded to the allegations concerning "victor's justice" and impunity for RPF soldiers by stating: "The suggestion that no investigations or prosecutions have been conducted or

This case study examining Rwanda's behavior allows us to test how well the credible threat theory can explain the ratification behavior of a state with poor human rights practices and weak domestic law enforcement institutions. In addition, it also allows us to compare the explanatory power of the credible threat theory to that of the credible commitment theory. Recall that Simmons' and Danner's credible commitment theory is addressed precisely to explaining the ratification behavior of states with poor human rights practices and a recent history of civil violence, but that also have weak institutions of domestic accountability. Even if Rwanda was not one of the states that Simmons and Danner included in this category, Rwanda necessarily possesses the characteristics that make it a good case study test of the credible commitment theory.³²⁶ As noted above, Rwanda only recently experienced a horrendous genocide, its human rights ratings have been and continue to be poor, and both its democracy and rule of law ratings indicate that it has weak domestic institutions of accountability.

Thus, according to Simmons and Danner's credible commitment threat theory, we should expect that Rwanda's autocratic leader, President Paul Kagame (and he has either actually or effectively been Rwanda's leader since the genocide ended in 1994), will want to commit to the ICC so as to demonstrate to Rwanda's domestic audience his determination to end the cycle of civil violence and the impunity that often accompanies such violence. Indeed, according to that theory, because the state has weak domestic institutions of accountability, Kagame should embrace joining an international institution like the ICC with relatively strong enforcement mechanisms because it will tie his hands – and the government's hands – and make him unable

that since has been delayed against RPF members due to the threat of non-cooperation from Rwanda is not borne out." In support of his position, he points out that more than 30 RPF soldiers have been prosecuted by Rwanda, a state which shares concurrent jurisdiction with the ICTR over crimes committed during the genocide. Letter of Hassan B. Jallow, ICTR Chief Prosecutor to Mr. Kenneth Roth, Executive Director, Human Rights Watch, OTP/2009/P/084, ICTR, June 22, 2009.

³²⁶ Simmons and Danner, "Credible Commitments and the International Criminal Court," 238.

to resort to violence in responding to any domestic crises. And, Kagame should calculate the costs of joining the ICC prospectively, rather than retrospectively, and embrace joining the ICC despite the sovereignty costs because the potential future gains of making a credible commitment can outweigh those costs.³²⁷ Indeed, Simmons and Danner argue that the ICC is the perfect mechanism for demonstrating a government's credible commitment to end the cycle of domestic violence and impunity because the stakes of violating the ICC's treaty terms are so high: government leaders can be arrested and brought to The Hague for prosecution.³²⁸

As the evidence shows, however, the credible threat theory, not the credible commitment theory, better explains Rwanda's and Kagame's behavior vis-à-vis the ICC. Not only has Rwanda failed to ratify the ICC treaty, but the facts show that given his country's history of civil violence, Kagame wants no constraints on his power to lead as he sees fit. Rather, Kagame's behavior shows that he believes he must have the power to resort to force and violence when doing so is in the best interests of the country as a whole in terms of its future peace and security. The facts demonstrate that Kagame is particularly wary of relinquishing his sovereignty and power to international institutions: Kagame does not want the international community to impose its values on Rwanda, and he does not want to allow it to substitute its judgment for his on the question of whether certain acts he or his colleagues committed were proper or, instead, deserving of punishment. For example, as described in detail below, in the aftermath of the genocide, Kagame ultimately decided that he had to use force in order to close the various refugee camps that had become home to many Rwandan Hutus who had participated in the genocide. And, although what began as force ended, in some instances, with acts of violence by Kagame's soldiers, Kagame has maintained either that the force was justified and necessary in

³²⁷ Simmons and Danner, "Credible Commitments and the International Criminal Court," 233.

³²⁸ Ibid. at 233-240.

order to avoid greater violence or that the acts of violence are not deserving of the same punishment that should be accorded to those who committed genocide. Although some in the international community have severely criticized Kagame for failing to hold his soldiers sufficiently accountable for those acts of violence, he continues to maintain that he – and Rwanda – should be the judge of what justice is proper in Rwanda for acts involving its citizens.

In addition, although there is a dearth of evidence on the specific question of why Rwanda refused to commit to the ICC, an examination of its relationship with the world community in connection with Rwanda's genocide and its relationship with the ICTR provides further evidence supportive of the credible threat theory – as opposed to the credible commitment theory. Those actions again show that Rwanda closely guards its sovereignty and wants to make its own determinations about how and whether justice should be meted out to its citizens based on actions occurring inside Rwanda. For example, Rwanda voted against the establishment of the ICTR on the grounds, among others, that the trials were not going to be held in Rwanda and because the tribunal would not be able to impose the death penalty. When the ICTR suggested that it may even want to prosecute some of Kagame's RPF soldiers for acts they had committed while fighting against the genocidaires, Rwanda became even more protective of its sovereignty. It launched a campaign against the ICTR and its prosecutor that was so successful in criticizing the tribunal and its actions that to this day, the tribunal has not issued any indictments against Kagame's soldiers.

In short, the evidence shows that the credible threat theory and rational and retrospective calculations about compliance costs best explains Rwanda's refusal to commit to the ICC. Rwanda has the kind of violent history and history of poor human rights practices that indicate it may not be able to fully comply with the terms of the ICC treaty. It also has poor domestic law

enforcement institutions, which means that if its government or citizens committed a crime covered by the ICC treaty, it may not be able to prosecute that crime domestically. Furthermore, the evidence shows that Rwanda closely guards its sovereignty and does not wish to have its hands tied by the international community or international institutions.

Moreover, based on its experience with the ICTR, Rwanda has learned – if it did not know so already – that its views about which of its citizens and what crimes are actually deserving of punishment may differ from those of the international community. But by joining the ICC, Rwanda would be committing to an enforcement mechanism that would allow an international institution to substitute its own judgment as to who and what actions were deserving of punishment for Rwanda's. Accordingly, because compliance with the ICC treaty would be difficult, Rwanda acted rationally in being wary of committing to the ICC because of the credible threat posed by its relatively strong enforcement mechanisms, rather than embracing those enforcement mechanisms so as to credibly commit to change its behavior – or risk being the subject of an international prosecution.

Although this case study focuses only on Rwanda, it serves to illustrate the power of the credible threat theory to explain the ratification behavior of other states with poor human rights practices and a history of violence. Like President Kagame, leaders of other states with similarly complicated and violent histories (even if the details of that history vary) also may not want to tie their hands and make a credible commitment to refuse to respond with force or violence to any domestic crises. In fact, as the case study of Rwanda shows, states with a history of violence may have the kinds of social cleavages that can continue to make civil violence a possibility, and the state may feel justified in responding with force simply so as to quell that violence and establish some sense of peace and security for the population as a whole. Thus, leaders of states

with a history of domestic violence, like Kagame, are more likely to be concerned about the credible threat posed by committing to an institution like the ICC with which they may not be able to comply and which they cannot control. Indeed, particularly where the state with the history of violence has an autocratic leader, commitment to the ICC seems disingenuous. If the autocratic regime is not willing to impose domestic constraints on its power to act as it pleases – thereby signaling its credible commitment not to act violently – why would it join the ICC so as to make that credible commitment? After all, while the autocratic regime may be able to put a stop to the domestic machinery it creates to impose accountability, it should not be confident that it would be able to stop the international machinery of the ICC – by which its leaders could be hauled to The Hague to stand trial.

This chapter is organized as follows. By way of background, I first discuss Rwanda's ethnic conflict and the 1994 genocide. The next section focuses on examining Kagame's actions in closing the refugee camps to which many genocidaires had fled in the immediate aftermath of the genocide. Providing support for the idea that autocratic leaders in post-violence situations will not want to tie their hands – particularly in a way the international community might deem appropriate – the evidence adduced in this section shows not only that Kagame resorted to using force (and his soldiers even resorted to violence), but also that Kagame maintained that given the circumstances, force was the only way to obtain what was necessary for Rwanda and its people.

I follow with an examination of Rwanda's relationship with the ICTR – an international criminal tribunal, which although not identical to the ICC, provides much evidence regarding Rwanda's reluctance to relinquish to the international community its sovereign right to administer justice to its citizens within its own borders. Again, not only does this examination of Rwanda's relationship with the ICTR provide evidence regarding its preferences, but it is useful

for understanding how other states with poor human rights practices and a history of civil violence – particularly under autocratic leadership – will view commitment to international human rights institutions. Rwanda’s actions demonstrate that it is concerned with the credible threat associated with committing to such institutions: no evidence suggests that it or its leader wants to bind Rwanda to any institution over which it does not have control and which would be able to constrain it from managing its affairs as it sees fit. To provide additional context for Rwanda’s decision to refrain from joining the ICC, I look at Rwanda’s behavior in connection with other international human rights treaties. That behavior too provides support for the credible threat theory and shows that Rwanda is strategic in committing to international human rights treaties and avoids those with strong enforcement mechanisms and with which it cannot comply. I conclude with a section that assesses the credible threat theory, particularly in light of Rwanda’s words and acts as they relate to the ICC.

Background: The Genocide of the 1990s

Colonial Rule and the “Ethnic” Divide

Rwanda is a country with three primary ethnic or tribal peoples. Historically, about 85% of the populace has been of Hutu origin; about 14% is of Tutsi origin; and about 1% is Twa peoples – descendents of cave-dwelling pygmies.³²⁹ With colonial rule, first by the Germans and later by the Belgians (after WWI), however, Hutus and Tutsis became identified as opposing “ethnic” identities. In fact, the Belgians exploited these perceived ethnic differences and made them a cornerstone of their colonial policy: they made the taller, thinner, more “noble-looking” Tutsis the favored ones, providing them with a monopoly on administrative and political jobs.

³²⁹ Philip Gourevitch, *We wish to inform you that tomorrow we will be killed with our families: Stories From Rwanda* (Picador: New York, 1998), 56-57.

The “coarser” looking Hutus were required to work as forced laborers in the fields and in construction works, with the Tutsis assigned to look on as taskmasters.³³⁰ To ensure there was no confusion as to the rulers and the ruled, all Rwandans were labeled and issued “ethnic” identify cards.³³¹

Although the Tutsi minority was favored with privileges during colonial rule, on the eve of independence, the Hutu majority began to demand “democracy” and the power to which it claimed to be entitled by virtue of being the majority. Its quest for control included a popular uprising, whereby during the late 1950s and early 1960s, Hutus attacked Tutsi authorities, torched Tutsi homes, and even sporadically murdered Tutsis. When they realized they would receive no help from their Belgian rulers – who had transferred power to Rwanda’s new Hutu leaders in January 1961 – Tutsis began fleeing to neighboring countries.³³² Discrimination and violence against Tutsis continued over the next several decades, such that the Tutsi exiled community grew to be quite substantial, especially in Uganda.

The 1994 Genocide

It was that Tutsi community in Uganda which in 1986 formed the Rwandese Patriotic Front – the rebel army that was responsible for defeating Hutu forces and ending the 1994 genocide. The RPF was founded to fight against the regime of Rwanda’s longstanding Hutu dictator, President Juvenal Habyarimana. Habyarimana’s policies had always involved discriminating against Tutsis; however, those policies turned increasingly violent.³³³ In 1990, the RPF responded to Habyarimana’s policies by declaring war on his regime and calling for an end to tyranny, corruption, and the ideology of exclusion which generated Tutsi refugees.

³³⁰ Ibid. at 54-57.

³³¹ Ibid. at 56-57.

³³² Ibid. at 58-62.

³³³ Ibid. at 76, 214.

Habyarimana, in turn only stepped up his government's repressive policies towards Tutsis: Tutsis were imprisoned or killed – all with the help of the new civilian militias known as the “*interahamwe*” who had been trained by the government army to fight against the RPF.³³⁴ Fighting continued during 1992 and 1993, as did a print and radio propaganda genocidal campaign aimed at eliminating Tutsis.³³⁵

Although in August 1993, President Habyarimana entered into a peace accord with the RPF ensuring a right of return for Rwanda's refugees and a new power-sharing government, that peace was short-lived. Instead, the genocidal campaign continued, and when President Habyarimana's plane was shot down in Kigali by missiles on April 6, 1994, killing began in earnest.³³⁶ Rwandan government forces and the *interahamwe* set up road blocks and went on a search to massacre Tutsis with their machetes.³³⁷ In only the first weeks of April, 1994, and while United Nations peacekeepers that had been deployed to Rwanda's capital city to implement the 1993 peace accord stood by, thousands of Tutsis were killed. After ten Belgian peacekeepers were murdered by Hutu troops, the United Nations effectively withdrew its peacekeepers, allowing a “wholesale extermination” of Tutsis to get underway.³³⁸ The wave of killings ended in mid-July when the RPF captured the city of Kigali. By that time, and in only a few short months, approximately 800,000 Tutsis and Hutu moderates had been slaughtered.³³⁹

³³⁴ Ibid. at 82-84, 93.

³³⁵ Ibid. at 87-99. Letter Dated 1 October 1994 From The Secretary-General Addressed To The President Of The Security Council, U.N. Doc. S/1994/1125, Oct. 4, 1994, ¶¶ 49-51.

³³⁶ To date, no one has claimed responsibility for the attack on Habyarimana's plane, nor has anyone been prosecuted for that offense. Some suggest Hutu extremists mounted the attack in order to provide flames to fuel the genocide. Others, including the French, argue that the RPF shot down the plane. Indeed, in 2006, a French judge issued international arrest warrants charging President Kagame and others of having planned and ordered the attack on the plane. Vanessa Thalmann, “French Justice's Endeavours to Substitute for the ICTR,” *Journal of International Law* (2008).

³³⁷ Ibid. at 99, 110-115; Letter Dated 1 October 1994 From The Secretary-General Addressed To The President Of The Security Council, U.N. Doc. S/1994/1125, Oct. 4, 1994, ¶¶ 42-44, 52.

³³⁸ Ibid. at 114.

³³⁹ Letter Dated 1 October 1994 From The Secretary-General Addressed To The President Of The Security Council, U.N. Doc. S/1994/1125, Oct. 4, 1994, ¶ 43.

On July 19, 1994, the RPF decided to form a power-sharing government along the lines of that envisioned by the peace accords agreed to in Arusha. As Rwanda's President, the RPF chose Pasteur Bizimungu, the most prominent Hutu in the RPF who had previously served the old regime for some years before defecting. Paul Kagame assumed the role of Vice President and Minister of Defense. By all accounts, however, Kagame was the *de facto* leader of the country even before he was elected President in 2000.³⁴⁰

The Aftermath of the Genocide: Kagame Closes the Refugee Camps

In the aftermath of the genocide, and much to the new regime's dismay, rather than standing by as it had during the genocide, the world community instead rushed to the aid of the many "refugees" of the genocide. The problem was not that the world community wanted to aid refugees. Rather, the problem was that in this case, most of those "refugees" were actually Hutus who had fled Rwanda beginning in mid-July once they sensed defeat.³⁴¹ In addition, many of the camps themselves had been created along Rwanda's borders with Burundi and Zaire, within what was called the "Turquoise Zone" – a protected area that was presided over by French troops as part of a 60-day humanitarian mission approved by the Security Council.³⁴² These camps were predominately occupied by Hutu genocidaires, and ex-army officers of the ousted government and the *interahamwe* presided over the camps.³⁴³ Moreover, because these camps were often located extremely close to the Rwandan border and because these ex-militiamen also had weapons – even though they should have been disarmed – they were able to

³⁴⁰ Stephen Kinzer, *A Thousand Hills: Rwanda's Rebirth and the Man Who Dreamed It* (Hoboken: John Wiley & Sons, 2008), 186, 221-24.

³⁴¹ Stephen Kinzer explains that the international community mistakenly believed that the people suffering in the camps were largely those that were survivors of the genocide, rather than those who had actually perpetrated the genocide. The world saw suffering, and instead of informing itself of the actual facts, rushed to provide aid to these "refugees." Kinzer, *A Thousand Hills*, 182.

³⁴² Kinzer, *A Thousand Hills*, 174-75.

³⁴³ *Ibid.* at 175.

wage raids into Rwanda where they set about terrorizing and killing Tutsis.³⁴⁴

Not only did the mere fact of the camps and their inhabitants cause the new regime to be frustrated and angry with the international community, but that frustration mounted as Rwanda sought to have the camps closed and the “refugees” returned to their homeland. The new Rwandan government said the country was safe enough for everyone to go home, even though of course, it intended to arrest persons who had participated in the genocide.³⁴⁵ But, the genocidaires, fearing that they would be treated as they had treated the Tutsis, refused to leave the camps, and the international organizations running those camps would not force their repatriation.

Violence in Closing the Kibeho Camp

Because Kagame deemed closing the camps a necessity, and because his pleas for assistance from the international community in closing the camps were generally met with inaction,³⁴⁶ Kagame and his soldiers took action. While Kagame’s forces were able to close some camps in a relatively peaceful manner,³⁴⁷ they had no such luck when it finally sought to close Kibeho – the last remaining camp – in 1995. That closing was chaotic from the beginning since some of the genocidaires were pressuring others in the camp not to cooperate with the forced repatriation. A conflict ensued with refugees hurling rocks at soldiers, to which the soldiers responded with gun fire. When refugees began running for the hills, the army opened fire into the crowd, shooting indiscriminately and lobbing grenades at them. The soldiers engaged in another round of shooting later that day when another group of refugees broke through the army’s lines. In the end, the death toll reached into the thousands. Although some

³⁴⁴ Ibid. at 167, 188-89.

³⁴⁵ Ibid. at 188.

³⁴⁶ Ibid. at 167.

³⁴⁷ Ibid. at 189.

had died in stampedes or been killed by *interahamwe*, many had also been killed by the Rwandan army.³⁴⁸ Rwanda estimated the number killed in Kibeho at some 360, while the United Nations and others suggested the number was somewhere between 2000 and 8000 people.³⁴⁹

The Kibeho tragedy (as it has been called) provides support for the idea that autocratic leaders in post-violence situations will not want to tie their hands – particularly in a way the international community might deem appropriate. The situation in the aftermath was complicated, and Kagame was unable to convince the world community to quickly close the refugee camps that were housing genocidaires and being used as staging grounds to plan and execute more violent attacks against the remaining Tutsi population. When he could not get the international community to act, Kagame mobilized his troops and sent them to close the camps. Although some camp closings proceeded peacefully, in the case of Kibeho, violence ensued. Indeed, an Independent International Commission of Inquiry determined that although the violence had not been one-sided, some RPF soldiers had summarily executed persons in the camp.³⁵⁰

Nevertheless, although some of Kagame's soldiers did resort to violence, Kagame has maintained that force was the only way to obtain what was necessary for Rwanda and its people. Kagame has acknowledged that the army's actions were unfortunate, but he emphasizes that the camps had to be closed and that the international community had refused to close them of its own accord or to assist in closing them.³⁵¹ He explained: "We said, 'If you don't want to close them, then we shall close them.' And that's what happened, that tragic situation. But, the camps

³⁴⁸ Gourevitch, We wish to inform you that tomorrow we will be killed with our families, 190-94.

³⁴⁹ Amnesty International, "Burundi and Rwanda Crisis Response, April 24, 1995, at 2.

³⁵⁰ U.N. Doc. S/1995/411, Report of the Independent International Commission of Inquiry into the events at Kibeho in April 1995, May 23, 1995, at ¶ 49.

³⁵¹ Ibid. Amnesty International reported that the Rwandan government acknowledged that hundreds of civilians had been killed, but it said the government sought to justify the killings as legitimate because its troops acted in self defense.

were no more, you see, and you could have had more trouble for the whole country by keeping the camps there.”³⁵²

Furthermore, Kagame has generally ignored calls by the international community to prosecute those of his soldiers who committed acts of violence in closing the Kibeho camp – further demonstrating that he does not believe the soldier’s actions are deserving of significant punishment and also that he believes Rwanda is entitled to decide how the acts of its citizens should be judged. In April 1996, Amnesty International reported that the RPF had killed thousands of people in the Kibeho camp closure and asked the government to bring to justice those who had committed the killings.³⁵³ Journalist Philip Gourevitch reports that two RPF officers who were in command at Kibeho were arrested shortly after the event and later tried, but he suggests the verdict only showed that the new regime did not view the soldiers’ actions as particularly criminal. They were convicted, but they were found guilty only of “having failed to use the military means at their disposal to protect civilians in danger.”³⁵⁴

Kagame’s 1996 Attack on the Paramilitary Camps in Zaire

The difficulties with the camps did not end with Kibeho, nor did Kagame’s difficulties with the international community. According to Kagame, by 1996, Hutu genocidaires in refugee camps in Zaire were preparing to invade Rwanda so that they could reclaim their power and conclude their extermination plan. In July 1996, Kagame visited Washington, Europe, and the United Nations and explained that if the international community would not stop the problem that was brewing in those camps, then Kagame would have to handle the problem himself. Apparently few believed his threat, in part because Zaire (now the Democratic Republic of the

³⁵² Gourevitch, 207.

³⁵³ Amnesty International, “Two Years After the Genocide – Human Rights in the Balance: An Open Letter to Pasteur Bizimungu,” April 4, 1996, at 5.

³⁵⁴ Gourevitch, We wish to inform you that tomorrow we will be killed with our families, 204.

Congo) was ninety-four times larger than Rwanda, but also because its leader, Mobutu Sese Seko, was an extremely powerful man in Africa, and attacking camps in his country would be a direct challenge to his regime.³⁵⁵

After the international community refused to act, however, Kagame again determined to act on his own plan: to close the camps in Zaire; to repatriate the hundreds of thousands of Hutus who were living there as refugees; and to overthrow Mobutu.³⁵⁶ Kagame created an alliance with Congolese rebel leader, Laurent Kabila, in order to accomplish his plan.³⁵⁷ In October 1996, Rwandan and Congolese rebel forces began attacking the camps around Goma in Zaire. In the course of the fighting, thousands of innocent refugees, as well as Hutu genocidaires were killed. And, as a result of the attacks, Kagame realized the goals of his mission: the camps were disbanded, about 1 million people returned to Rwanda, and Mobutu was forced to flee his country.³⁵⁸

Again, the RPF was accused of committing crimes in connection with closing the camps in Zaire (the Congo).³⁵⁹ Again, though, Kagame's statements stress the necessity of his actions given the international community's failure to act. When asked by journalist Philip Gourevitch about his actions in the Eastern Congo, Kagame pointed out that former Rwandan military genocidaires had begun killing Tutsis again and that the genocidaires, who were armed with

³⁵⁵ Kinzer, *A Thousand Hills*, 197-98, 200; Gourevitch, *We wish to inform you that tomorrow we will be killed with our families*, 292.

³⁵⁶ Kinzer, *A Thousand Hills*, 199.

³⁵⁷ *Ibid.* at 201.

³⁵⁸ *Ibid.* at 203-05.

³⁵⁹ Indeed, a recent mapping report issued by the United Nations Office of the High Commissioner for Human Rights details alleged war crimes and crimes against humanity committed during the 1996 war in the Congo, some of which are attributed to Rwandan forces. Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (August 2010), at 78-114. President Kagame strongly objected to the report and threatened to pull Rwanda's 3000 peacekeepers from the African Union-UN peacekeeping mission in Darfur if the report was published and allegations suggesting Rwanda's troops may also have committed crimes of genocide in the Congo were not removed. Eventually, President Kagame backed away from his threat. Human Rights Watch, "DR Congo: Q & A on the United Nations Human Rights Mapping Report," Oct. 1, 2010, available at <http://www.hrw.org/en/news/2010/10/01/dr-congo-q-united-nations-human-rights-mapping-report?print>.

weapons and grenades, were refusing repatriation. He stated that the war in the Congo happened as it had in order that Rwanda would not “be rubbed off the surface of the earth.”³⁶⁰

Rwanda and the ICTR

Establishment of the ICTR and Rwanda’s Lone Dissenting Vote

An examination of the events leading up to the establishment of an international tribunal to try Rwanda’s genocidaires similarly demonstrates that Rwanda is a country that closely guards its sovereignty and wants to make its own determinations about how and whether justice should be meted out to its citizens based on actions occurring inside Rwanda.

For example, even though Rwanda had asked the international community to establish an international tribunal to assist it with prosecuting perpetrators of the genocide, it thereafter voted against establishing the ICTR. Rwanda sought international assistance precisely because in the aftermath of the genocide, it did not have the institutions or resources to carry out a plan for prosecutions without assistance. According to a Human Rights Watch report issued shortly after the genocide, as a result of the wholesale slaughter of Tutsis, Rwanda had only 36 judges, 14 prosecutors, and 26 police inspectors (none of whom even had access to a vehicle).³⁶¹ Thus, by a letter to the Security Council, among other things, Rwanda asked the international community for assistance in improving its own security forces, including the police, and to establish an international tribunal to prosecute the genocidaires.³⁶² In its request, Rwanda noted that the crimes committed in Rwanda were of an international nature and the international community should be involved in punishing such crimes. Second, it emphasized that an international

³⁶⁰ Gourevitch, We wish to inform you that tomorrow we will be killed with our families, 339.

³⁶¹ Human Rights Watch, “Rwanda: The Crisis Continues,” April 1995, available at <http://www.hrw.org/rports/1995/Rwanda.htm>.

³⁶² Letter from the permanent representative of Rwanda to the President of the Security Council, U.N. Doc. S/1994/1115, Sept. 29, 1994, at 4.

tribunal would have an advantage of appearing fair and neutral and would avoid any suspicion that Rwanda was trying to organize vengeful justice. Third, Rwanda stated that involving the international community would make it easier to arrest and bring to justice those criminals who had taken refuge in foreign countries.³⁶³

However, when it came time to vote for establishing that international tribunal, Rwanda, as a temporary member of the Security Council (merely coincidental), stood alone in voting against it.³⁶⁴ Apparently although the Rwandan government had wanted an international tribunal, it only wanted a tribunal that would be shaped according to its wishes and that would take into account its customs and concerns.³⁶⁵ In voting against the tribunal, Rwanda emphasized several aspects of the ICTR's institutional design that it viewed as unacceptable.

First, Rwanda objected to the ICTR's temporal jurisdictional restrictions which would only allow it to consider crimes that occurred between January 1, 1994 and December 31, 1994.³⁶⁶ Rwanda had proposed instead that the ICTR should be able to consider crimes committed between the time period from October 1, 1990 and July 17, 1994. As the Rwandan Ambassador noted, excluding the earlier time periods would mean that the tribunal had no jurisdiction to prosecute persons who participated in planning the genocide in the several years leading up to 1994.³⁶⁷ Victor Peskin, however, explains that by seeking an end date of July 17, 1994, the Rwandan government also hoped to ensure the tribunal could not consider any of the

³⁶³ U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/PV.3453, Nov. 8, 1994, at 14.

³⁶⁴ S.C. Res. 955, U.N. Doc. S/Res/955, Nov. 8, 1994.

³⁶⁵ For example, Victor Peskin reports that Joseph Mutaboba, Rwanda's deputy foreign minister and former ambassador to the UN told him that Rwanda wanted a tribunal, but that it never got what it had asked for. Another senior government official echoed that same sentiment, stating that Rwanda wanted a "tribunal set up and structured as we wished." Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press: Cambridge, 2008), 159.

³⁶⁶ S.C. Res. 955, U.N. Doc. S/Res/955, Nov. 8, 1994, Art. 7.

³⁶⁷ U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/PV.3453, Nov. 8, 1994, at 15.

crimes the RPF committed against Hutu civilians after the conclusion of the conflict.³⁶⁸ In a related vein, Peskin points out that Rwanda also objected to the lack of clear rules requiring the tribunal to use its limited resources to prosecute the most serious crimes of genocide, rather than any lesser crimes. Again, Peskin suggests that this objection, too, was designed – at least in part – to insure that the tribunal would have no legal authority to indict RPF officers who had committed non-genocidal crimes against Hutus.³⁶⁹

Second, Rwanda objected to what it perceived to be the limited institutional capacity of the tribunal. Against its wishes, the ICTR was slated to share resources – such as a prosecutor and an appeals chamber – with the International Tribunal for the former Yugoslavia (“ICTY”). In addition, the ICTR was created with funding only for two courtrooms. In Rwanda’s opinion, without additional resources, the tribunal would not be able to fulfill its mission of efficiently and effectively dispensing justice and holding the many high-level perpetrators of the genocide accountable. Indeed, Rwanda’s Ambassador to the United Nations argued that these facts showed the international community had little interest in having the ICTR succeed in its mission. He stated: “My delegation considers that the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular.”³⁷⁰

Third, Rwanda could not abide a tribunal that would not impose the death penalty as punishment for those found guilty of genocide and crimes against humanity. At the time, under its domestic laws, Rwanda allowed the death penalty for murder, and it believed that the death penalty was a punishment commensurate with the gravity of the crime of genocide. Rwanda pointed out the failure to impose the death penalty at the ICTR would create an unfair disparity

³⁶⁸ Peskin, *International Justice in Rwanda and the Balkans*, 162.

³⁶⁹ *Ibid.*

³⁷⁰ U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/PV.3453, Nov. 8, 1994, at 15.

in punishments. The high-level suspects who had planned the genocide would receive sentences at the ICTR lighter than those Rwanda would be imposing on the lower-level suspects it would be trying domestically. Rwanda's Ambassador to the United Nations further emphasized that such a situation would not be "conducive to national reconciliation in Rwanda."³⁷¹ In an interview with Philip Gourevitch, President Kagame similarly stated that Rwanda could not support a tribunal that would not provide for capital punishment out of respect for Rwanda's laws. In response to Rwanda's objections, however, according to Kagame, the United Nations advised Rwanda to abolish the death penalty – a position that Kagame suggested was "cynical."³⁷²

Finally, in terms of other significant objections, Rwanda stated that it could not support a tribunal that was not located within its country. The Rwandan Ambassador to the United Nations explained that the main reason Rwanda requested an international tribunal was "to teach the Rwandese people a lesson, to fight against the impunity to which it had become accustomed since 1959 and to promote national reconciliation." Therefore, he suggested that since the tribunal would have to deal with Rwandese suspects who had committed crimes in Rwanda against Rwandese, the tribunal adjudicating those crimes should sit in Rwanda. He further noted that "establishing the seat of the Tribunal on Rwandese soil would promote the harmonization of international and national jurisprudence."³⁷³ The international community, however, refused to commit to locating the ICTR in Rwanda at the time it voted to establish the tribunal. And, ultimately, it decided to locate the ICTR in Arusha, Tanzania. Basically, the United Nations worried that concerns about fairness and independence, as well as administrative efficiency, counseled against locating the tribunal in Rwanda: if the tribunal was in Kigali, the Rwandan

³⁷¹ Ibid.

³⁷² Gourevitch, We wish to inform you that tomorrow we will be killed with our families, 254.

³⁷³ Ibid. at 16.

government might be able to wield too much influence over it and thereby undermine its independence.³⁷⁴ In fact, Victor Peskin suggests that while the Rwandan government may have pushed for locating the tribunal in Rwanda so as to promote national reconciliation, it also knew that it would have more influence over the tribunal if it was within the country. He stated: “A UN decision to locate the court inside Rwanda could be used by the government as demonstration of power over the international community and the Hutu masterminds of the genocide. But, as long as the tribunal remained out of the country – even in neighboring Tanzania – it ran the risk of being seen by Rwandans as an abstract international enterprise.”

Nevertheless, although it is true that the international community did not yield to all of Rwanda’s requests when it created the ICTR, the evidence does show that the Rwandan government was able to convince the Security Council to grant it some concessions. As Victor Peskin points out, the United Nations finally agreed to locate the deputy prosecutor’s office in Kigali. The Council also permitted the ICTR to hold trials in Rwanda if it chose to do so. In addition, the United Nations changed the tribunal statute to allow convicted ICTR defendants to serve their time in Rwanda. Moreover, the temporal restrictions on the ICTR’s jurisdiction actually aided the Rwandan government as they ensured that any crimes committed by the RPF after the conclusion of the genocide would not be investigated by the tribunal.³⁷⁵ Despite these concessions, however, Rwanda remained critical of the ICTR and continued to portray the institution as one that was created only to assuage the international community’s conscience and with little regard for Rwanda or its many victims. In short, the evidence at the time of negotiations and thereafter shows that Rwanda wanted an international tribunal to try perpetrators of the genocide that was carried out within its borders, but it also wanted significant

³⁷⁴ Peskin, *International Justice in Rwanda and the Balkans*, 166.

³⁷⁵ *Ibid.* at 167-68.

control over that organization. Absent significant control, Rwanda would not vote for establishing the ICTR or, as discussed below, cease from criticizing the institution or fully cooperate with it.

Rwanda and the ICTR in Practice: The Issue of RPF Indictments

Rwanda's interest in having a tribunal that was under its control – rather than the control of the international community – also manifested itself in how Rwanda criticized the tribunal or, at times, sought to assert its own influence over it. Rwanda voiced criticisms about – and mounted demonstrations against – many aspects of the ICTR's operations and practices, including the slow pace of indictments and prosecutions.³⁷⁶ However, it is the facts relating to the ICTR's decision to potentially indict RPF soldiers for acts they had committed while fighting against the genocidaires which show just how far Rwanda would go to protect its sovereignty against the international community's attempt to substitute its own judgment for Rwanda's as to how and against whom justice should be dispensed. When ICTR Prosecutor Carla Del Ponte appeared to be focusing on potentially indicting RPF soldiers for atrocities they committed during the genocide, Rwanda ceased cooperating with the tribunal and even managed to have the prosecutor removed from her post. Its campaign against the ICTR and its prosecutor was so successful that to this day, the tribunal has not issued any indictments against Kagame's soldiers. And, although Rwanda has – perhaps because of tribunal pressure – domestically prosecuted some RPF soldiers for killing Hutu civilians during the course of the genocide, the fact that the ICTR itself has not brought such cases has led some commentators and international human rights organizations to charge the ICTR with dispensing only “victor's justice.”³⁷⁷

³⁷⁶ Peskin, *International Justice in Rwanda and the Balkans*, at 178.

³⁷⁷ Luc Reydam, “The ICTR Ten Years On: Back to the Nuremberg Paradigm?” *Journal of International Criminal Justice* 3(2005): 977-988; Human Rights Watch, “Letter to the Prosecutor of the International Criminal Tribunal for

The conflict between Rwanda and the tribunal was triggered when then-Chief Prosecutor Del Ponte announced in December 2000 that she had decided to expand her probe beyond the Hutu-perpetrated genocide to include an investigation of Tutsi RPF army officers suspected of committing atrocities against Hutu civilians during 1994.³⁷⁸ Although the Rwandan government initially agreed to cooperate with the ICTR's so-called special investigation, the scenario played out differently.³⁷⁹ Not only did Rwanda withhold cooperation, but also, early on, it went on the offensive against the ICTR, continuing to criticize it for the slow pace of the genocide trials.³⁸⁰ It also managed to mobilize Tutsi survivor groups who accused the tribunal of victim and witness mistreatment. For example, Rwanda noted that the tribunal had arrested a veteran Hutu defense investigator after evidence showed that he had participated in massacring Tutsis during the genocide. In addition, it accused a panel of ICTR judges of demeaning and unprofessional conduct for laughing during the cross-examination of a Tutsi rape victim.³⁸¹ The prosecutor's office countered that the arrest was an isolated incident and that the judge's behavior had been misinterpreted.

Nevertheless, by April 2002, when Prosecutor Del Ponte publicly stated that indictments would be forthcoming in late 2002, the Rwandan government was well poised to block her

Rwanda Regarding the Prosecution of RPF Crimes," May 26, 2009, available at <http://www.hrw.org/en/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf-c?print> (stating that the failure to "address the RPF's killing of tens of thousands of civilians will result in serious impunity for grave crimes committed in 1994 and would leave many with a sense of one-sided, or victor's, justice," thereby undermining the ICTR's legacy). The ICTR's present Chief Prosecutor, Hassan B. Jallow, however, has defended the ICTR's failure to prosecute members of the RPF, noting that the tribunal "has understandably focused for many years in the genocide as this is the main crime base of its mandate." He further suggested that RPF prosecutions would best be handled domestically where they could have a potentially greater impact on national reconciliation. Letter from Hassan B. Jallow to Mr. Kenneth Roth, Executive Director, Human Rights Watch, OTP/2009/P/084, June 22, 2009.

³⁷⁸ Peskin, *International Justice in Rwanda and the Balkans*, 187-88.

³⁷⁹ *Ibid.* at 188.

³⁸⁰ Peskin states that at the time Del Ponte announced her investigations of RPF soldiers, the ICTR had only completed eight genocide cases, three of which were the result of plea bargains. *Ibid.* at 192.

³⁸¹ *Ibid.* at 194-200.

efforts.³⁸² Citing concerns about witness protection, during June 2002, the Rwandan government actually managed to shut down most tribunal business when it prevented Tutsi genocide survivors scheduled to testify on behalf of the ICTR prosecution from boarding the UN plane to Arusha. Victor Peskin reports that although the government's actual motivation for preventing witness travel cannot be known with certainty, his own interviews of tribunal officials and Western diplomats suggested that the government was, in effect, warning the ICTR that if it followed through on issuing RPF indictments, it would not be able to count on Rwanda's cooperation.³⁸³

Although the Rwandan government did resume allowing witnesses to travel in July 2002, its offensive against Del Ponte continued until it ultimately succeeded in having her removed from her post as the ICTR's chief prosecutor. After she met in The Hague with a Hutu rebel group to gather facts for her proposed RPF indictments, the Rwandan government publicly alleged that she was consorting with genocidaires, had lost her moral authority to prosecute genocide cases, and was unfit to serve the ICTR.³⁸⁴ Del Ponte defended her actions, pointing out that she had a right to investigate as she saw fit and called for punitive action to enforce Rwanda's obligation to cooperate with the tribunal even if it was investigating RPF actions. But, 2002 passed without Del Ponte handing down any RPF indictments. And, even though the reasons for the absence of such indictments are unknown, Peskin reports that according to his sources, the RPF investigations had ceased after Rwanda had resumed allowing witnesses to travel.³⁸⁵

Nor did Del Ponte have much chance in the following year to obtain those indictments

³⁸² Ibid. at 209.

³⁸³ Ibid. at 212-13.

³⁸⁴ Peskin, *International Justice in Rwanda and the Balkans*, 219.

³⁸⁵ Ibid.

since by the summer of 2003, and after much lobbying of UN delegations by the Rwandan government, the United Nations decided to appoint a chief prosecutor for each tribunal: it dismissed Del Ponte from her role at the ICTR and retained her as the prosecutor of the ICTY only.³⁸⁶ While it would likely be impossible to unravel the many reasons why the United Nations might decide some nine years later to appoint a single prosecutor to head each of the tribunals, the timing does suggest that Rwanda's campaign against Del Ponte played a role. Indeed, Del Ponte herself suggests that the dismissal was meant to prevent her from gathering enough evidence to issue RPF indictments.³⁸⁷ She noted that both the United States and Britain had pressured her to drop the RPF investigations and allow Rwanda to handle them on its own. She said that Western officials argued that the possibility of instability in the wake of RPF indictments was a reason to drop the investigations. But, Del Ponte was convinced other reasons were behind the United States' pressure to drop the investigation: she suggested that the Bush administration may have agreed to help Rwanda keep the ICTR from indicting RPF suspects in exchange for Rwanda's agreement to sign a bilateral immunity agreement with the United States ensuring that it would not extradite any indicted United States military to the ICC.³⁸⁸

In sum, the way the events played out again show that Rwanda was not interested in an international tribunal which it could not control. Rather, events show that the Rwandan government – which was under the de-facto control of former-RPF leader, Paul Kagame – was only interested in an international tribunal that would focus on prosecuting its enemies.³⁸⁹ As

³⁸⁶ Ibid. at 220.

³⁸⁷ Ibid. at 221.

³⁸⁸ Ibid. at 222.

³⁸⁹ A Commission of Experts appointed by the United Nations and international human rights organizations did find some evidence that RPF soldiers engaged in revenge or other mass killings during the course of the genocide. United Nations Commission of Experts, Final Report, U.N. Doc. S/1994/1405, Dec. 9, 1994, at ¶¶ 93-98; Human Rights Watch, "The Rwandan Patriotic Front," available at http://www.hrwo.org/legacy/reports/1999/rwanda/Geno15-8-03.htm#P1002_309600. President Kagame, however, has generally maintained that although RPF soldiers did commit some revenge killings, they did so as individuals

noted above, the tribunal has still not issued any indictments against RPF soldiers, and although it has been criticized for failing to do so, it has also defended its decision to allow Rwanda to deal with those crimes on its own.³⁹⁰

This examination of Rwanda's relationship with the ICTR provides evidence that it carefully guards its sovereignty and does not want to relinquish control over its own domestic affairs to an international institution. It had many objections to the ICTR, but it was particularly hostile to the tribunal and ceased cooperating with it when the tribunal sought to hold Kagame's soldiers accountable for acts they committed during the course of the genocide. Indeed, the evidence shows that Kagame believes that he, rather than the international community, should be in charge of determining whether he and his soldiers are deserving of punishment. Given this evidence about how Rwanda acted in connection with the ICTR, it makes sense that it would be concerned with the credible threat associated with joining the ICC – an institution over which it would not have control and which would be able to constrain it from managing its affairs as it sees fit.

Rwanda's experience with the ICTR is also useful for understanding how other autocratic states with poor human rights practices and a history of civil violence may view commitment to an international human rights institution like the ICC which would be able to substitute its own judgment for the state's judgment regarding who, and what actions, should be prosecuted.

Although Rwanda's experience is certainly unique, all states that have experienced civil violence have some cleavage between certain elements of society, and whether a particular person or

and without authorization. In fact, in response to the Commission of Expert's inquiry into the matter, he explained that some 70 soldiers had been arrested and that all individual acts would be punished. Ibid. at ¶ 99.

³⁹⁰ Letter from Hassan B. Jallow to Mr. Kenneth Roth, Executive Director, Human Rights Watch, OTP/2009/P/084, June 22, 2009. The ICTR's first Chief Prosecutor, Richard Goldstone has stated that he did not think there was overwhelming evidence of RPF crimes and that, in any event, since those crimes would not rise to the level of a genocide, the limited resources of the tribunal should not be diverted to prosecute those lesser crimes. Peskin, *International Justice in Rwanda and the Balkans*, 189.

group is deserving of punishment based on its actions may differ depending on which person or group has prevailed in the conflict. Furthermore, it is likely that persons on all sides of the violence committed some crimes – even if some crimes, as in Rwanda’s case with the crimes of genocide, may be considered more deserving of punishment. Like Kagame, leaders of countries with a history of civil violence may rationally believe that they are in the best position to determine who and what should be punished inasmuch as they – not the international community – had direct experience with the violence. Like Kagame, they may wish to avoid joining an institution like the ICC which could seek to punish them or others who they believe are not deserving of punishment.

Rwanda’s Participation in the International Human Rights Regime: Avoiding Costly Commitment

Rwanda’s participation in the international human rights regime is consistent with the evidence adduced above which shows that Rwanda is a country that closely guards its sovereignty and is, at the very least, wary of making costly commitments to international institutions. As Table 22 shows, with only one exception, Rwanda has chosen to participate only in those international human rights treaties with weak enforcement mechanisms – and accordingly, those that do not impose significant sovereignty costs on the state by virtue of membership.

Table 22: Commitment to the Six Primary International Human Rights Treaties

Treaty	Enforcement Mechanism	Date Open	Ratification Date
ICCPR	Reports	1966	1975
ICESCR	Reports	1966	1975
CERD	Reports	1966	1975
CEDAW	Reports	1980	1981
CAT	Reports	1984	2008
CRC	Reports	1989	1991
ICCPR Art. 41	State Complaints	1966	--
CAT Art. 21	State Complaints	1984	--
ICCPR Opt.	Individual Complaints	1966	--
CERD 14	Individual Complaints	1966	--
CAT 22	Individual Complaints	1984	--
CEDAW Opt.	Individual Complaints	1999	2008
CAT Opt.	Committee Visits	2003	--

A closer look at Rwanda's recent ratification of the CAT treaty and the CEDAW Optional Protocol also support a conclusion that Rwanda approaches international human rights treaties with a goal towards avoiding costly commitments. As to the CAT treaty which requires only state reporting, Rwanda did not ratify that treaty until December 2008, which as discussed below, was only after it had abolished the death penalty in 2007. In addition, it did not ratify the CEDAW Optional Protocol allowing for individual complaints until December 2008, a date by which it could likely see that the Committee overseeing those complaints – as mentioned in Chapter Four – is not particularly active.³⁹¹ Of course, it is true that given the genocide and the difficulties of rebuilding the country in the aftermath of that tragedy, the government likely lost many years in which it would even consider joining international human rights treaties.

However, Rwanda has stabilized in recent years, and its timing in ratifying the CAT and its

³⁹¹ The committee overseeing CEDAW only began issuing decisions on individual complaints in about 2004. As of October 2010, individuals had submitted 27 complaints, 11 of which the Committee had concluded were inadmissible. It has issued views on only 7 of those cases thus far. Information about the Committee's activities can be obtained from <http://www2.ohchr.org/english/law/cedaw-one.htm>.

decision to ratify only the one treaty containing additional enforcement mechanisms suggest that it retrospectively calculates its compliance costs and seeks to avoid committing to treaties with which it cannot comply.

Indeed, with respect to the CAT, not only did Rwanda wait to ratify the CAT until after it had abolished the death penalty, but it also only abolished the death penalty when it realized that doing so could aid it in recapturing its sovereign rights to prosecute perpetrators of the genocide. One main reason that states in Europe and the ICTR were refusing to transfer genocide cases to Rwanda to try domestically was because Rwanda's laws allowed it to impose the death penalty.³⁹² Therefore, on March 16, 2007, the government abolished the death penalty – but only for persons who were convicted in a case transferred to Rwanda from the ICTR. Only later, in July 2007, did the government entirely abolish the death penalty from Rwandan law.³⁹³ By the new laws, however, certain offenses that were previously punished by the death penalty were punishable instead by life imprisonment with “special provisions,” – meaning that persons may have to serve their life sentences in solitary confinement.³⁹⁴ Nevertheless, and providing further evidence that the Rwandan government's changes to its sentencing laws were motivated by a strategic desire to obtain the transfer of ICTR cases, that “special provisions” law was amended to exclude genocide suspects transferred by the ICTR. Specifically, after the ICTR court refused a transfer request because there was a possibility that Rwandan courts might impose life imprisonment in solitary confinement, in November 2008, Rwanda passed another law which provides that life imprisonment with special provisions shall not be imposed in cases transferred

³⁹² Amnesty International, 2008 Report, Rwanda.

³⁹³ Audrey Bector, “The Abolition of the Death Penalty in Rwanda,” *Human Rights Review* 10 (2009): 109.

³⁹⁴ Mujuzi, “Issues Surrounding Life Imprisonment After The Abolition Of The Death Penalty In Rwanda,” 329.

to Rwanda from the ICTR.³⁹⁵

In short, although international human rights organizations still accuse Rwanda of treating its prisoners poorly and argue that imposition of life imprisonment with solitary confinement constitutes torture,³⁹⁶ the facts still demonstrate that Rwanda only ratified the CAT after it had taken steps to minimize the costs of complying with the treaty. After all, unlike the ICCPR, the CAT is not express in stating that for countries “which have not abolished the death penalty, sentence of death may be imposed” for the most serious crimes.³⁹⁷ And, courts in many parts of the world have concluded that the death penalty is a cruel, inhuman and degrading punishment.³⁹⁸ As to life imprisonment with solitary confinement, on the other hand, whether that constitutes torture may be less clear. For example, the Human Rights Committee has stated only that “prolonged solitary confinement of the . . . imprisoned person *may* amount to” torture or cruel, inhuman or degrading punishment.³⁹⁹ Thus, although Rwanda’s sentencing regime still may be subjected to criticism, by joining the CAT only after it had abolished the death penalty, Rwanda eliminated the death penalty as a subject of criticism by the Committee against Torture or others.

The evidence also suggests that Rwanda joined the CEDAW Optional Protocol in December 2008 only when it could have been assured that compliance costs and the associated risks to its sovereignty would not be significant. That Convention provides that States Parties condemn discrimination against women in all its forms and agree to pursue policies of

³⁹⁵ Organic Law No. 66/2008 of 21 November 2008 Modifying and Complementing Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty.

³⁹⁶ Human Rights Watch, “Law and Reality: Progress in Judicial Reform in Rwanda,” July 2008, 82-85; Hirondelle News Agency, “Rwanda: Human Rights Watch Urges Govt to Completely Abolish Solitary Confinement Sentence,” Jan. 29, 2009, available at <http://allafrica.com/stories/printable/200902180342.html>.

³⁹⁷ ICCPR, at Art. 6(2).

³⁹⁸ Jamil Ddamulira Mujuzi, “Issues Surrounding Life Imprisonment After The Abolition Of The Death Penalty In Rwanda,” *Human Rights Law Review* 9 (2009): 329.

³⁹⁹ Human Rights Committee, General Comment No. 20, HRI/GEN/1/Rev.1 at 30 (1994) (emphasis added).

eliminating discrimination against women in all fields – including the political, social, economic, and cultural fields. By the Optional Protocol, states agree that individuals may file complaints with a committee alleging that the state has not complied with treaty requirements. Although the Optional Protocol does contain increased enforcement mechanisms, the evidence also suggests that by joining the treaty, Rwanda does not face a significant threat to its sovereignty. First, a review of the Committee’s 2009 draft concluding observations regarding Rwanda show that Rwanda is not particularly noncompliant with the treaty’s terms and that “a number of changes in laws, policies and programmes with positive impact on the rights of women have occurred” recently.⁴⁰⁰ Second, the CEDAW Committee reviewing individual complaints is not particularly active, and Rwanda would have reason to believe that it would not be subjected to such complaints. Even if individuals did file complaints against Rwanda, the Committee is only entitled to try to persuade the country to adopt its views. Therefore, because it may be able to substantially comply with treaty terms, and because the Committee is not particularly active, and in any event has no power to force Rwanda to adopt its views, Rwanda likely determined that committing to the CEDAW Optional Protocol would not impose significant sovereignty costs.

One might ask why Rwanda would join any international human rights institution given the difficult relationship it has had with the international community both before and after the genocide. Indeed, Rwanda joined the CAT and the CEDAW Optional Protocol while under the leadership of President Kagame, a person who has been vocal in expressing his frustration with and distrust of the international human rights community. While one may never know precisely why Rwanda joined these institutions, the facts still suggest that the decisions to join were based on rational and retrospective calculations about the costs of complying with treaty terms. By

⁴⁰⁰ Committee on the Elimination of Discrimination against Women, 43rd Sess., “Draft concluding observations of the Committee on the Elimination of Discrimination against Women: Rwanda,” CEDAW/C/RWA/CO/6, Sept. 8, 2009.

abolishing the death penalty, and thereafter joining the CAT, Rwanda hopes to make a better case for being able to try genocide cases domestically – something of a bid to regain some sovereign rights. In addition, even putting aside the fact that Rwanda may be able to sufficiently comply with these treaties, the treaties do not have enforcement mechanisms that are strong enough to impose significant sovereignty costs on Rwanda. By joining these treaties, unlike by joining the ICC, Rwanda is not agreeing that an international body can bring its citizens before a court in The Hague if that international body decides that Rwanda’s practices and processes do not meet international standards. Instead, because commitment to these treaties is not particularly costly, Rwanda can join as “window dressing” only and appear to embrace international human rights norms. Such window dressing could be beneficial given that Rwanda is presently on a path whereby it is pursuing economic growth and the international investment that can be critical to that growth. As Steven Kinzer explains, President Kagame’s goal is to pull Rwanda from poverty into prosperity in relatively short order.⁴⁰¹

Rwanda and the ICC: Assessing the Explanatory Power of the Credible Threat Theory

As noted above, Rwanda did express some interest in an international criminal court, but it has neither signed nor ratified the Rome Statute. Based on the evidence outlined above, the country’s decision to refrain from joining the ICC is not surprising, and indeed, is consistent with the credible threat theory. Because Rwanda’s human rights practices and domestic law institutions are poor, Kagame has acted rationally in focusing on the credible threat associated with the ICC’s enforcement mechanisms and in refusing to relinquish Rwanda’s sovereign right to mete out justice as it sees fit to an international institution that would be able to substitute its own judgment as to what is right and proper for Rwanda’s. And, Rwanda’s decision to refrain

⁴⁰¹ Kinzer, *A Thousand Hills*, 4-8.

from joining the ICC is consistent with its behavior in connection with other international human rights treaties. The evidence suggests that Rwanda acts in a rational and strategic manner when determining whether or not to join international human rights treaties and avoids those with strong enforcement mechanisms and with which it cannot comply. For example, the country only joined the CAT after it had abolished the death penalty, and it only abolished the death penalty so that it could regain its sovereign right to prosecute genocide suspects domestically.

The explanatory power of the credible threat theory is all the more clear when one compares it to the explanatory power of Simmons and Danner's credible commitment hand-tying theory. Those scholars argue that by committing to the ICC, states with weak domestic accountability mechanisms can credibly demonstrate that they will not resort to the usual tactics that recklessly endanger civilians, such as wantonly mistreating prisoners and violently persecuting opposition groups, since should they do so, they may be prosecuted.⁴⁰² But, Rwanda is a case that clearly demonstrates that countries with poor practices and weak domestic accountability will not necessarily want to tie their hands by committing to the ICC and risking prosecution.

The evidence shows that Kagame wants to rule in his way without interference; he does not want his actions or leadership style judged or challenged by others; and he certainly does not want himself or his colleagues to be subjected to the possibility of prosecution by an international institution. However, by joining the ICC, states must agree that an international institution has the right to require the country's citizens to stand for trial in The Hague if the institution decides the country was "unwilling or unable" to prosecute any of covered crimes domestically. The evidence does not suggest that Kagame would accept such a costly arrangement especially since he has had the experience of having his country's and his soldiers'

⁴⁰² Simmons and Danner, "Credible Commitments and the International Criminal Court," 233-34.

human rights practices criticized by the world community. He has justified conduct by the RPF that some in the international community have argued constitute mass atrocities. When he was criticized for how he and his soldiers handled closing the refugee camps, he fought back by arguing that the actions were necessary given the threat to Rwanda and given the inaction of the world community. And, Kagame's leadership style is still being criticized to this day – a fact which would contribute to a conclusion that joining the ICC would be risky and costly. Even recent reports of international human rights organizations accuse Kagame of ruling repressively, treating prisoners badly, and persecuting his political opponents.

In addition, there is much evidence which shows that Kagame does not take kindly to criticisms by outsiders, particularly when those outsiders seek to substitute their own judgment for his regarding his actions and how he and his government mete out justice. For example, in 2006, when a French judge issued a report charging Kagame and others with having orchestrated the assassination of President Habyarimana, Kagame responded by breaking diplomatic relations with France.⁴⁰³ In addition, Kagame admits to having contempt for the various human rights groups that claim Rwanda does not respect civil liberties, follow the rule of law, or fairly dispense justice.⁴⁰⁴ After Human Rights Watch issued a report claiming that some 20 Rwandans had died in police custody, Kagame told reporters that anyone who would make such charges had “‘probably consumed drugs.’”⁴⁰⁵ Kagame also responded badly after Paul Rusesabagina of *Hotel Rwanda* fame accused Kagame and his RPF soldiers of committing mass atrocities against

⁴⁰³ Kinzer, *A Thousand Hills*, 274-75.

⁴⁰⁴ Kinzer quotes Kagame as follows: “Some people keep making stupid and unfair noises about us. They don’t know what we prevented from happening. That it did not happen is what they should really be trying to tell people. That’s why I’m really full of contempt, in some cases, for some of these people who try to put themselves in roles where they know better than others about observance of human rights, democracy and good governance. I don’t know what they are thinking about. I have contempt for them. I really have a lot of it.” Kinzer, *A Thousand Hills*, 328.

⁴⁰⁵ Kinzer, *A Thousand Hills*, 331.

Hutus for which they have not been held accountable.⁴⁰⁶ In a series of speeches and interviews, Kagame called Rusesabagina a “hero made in Hollywood” and disputed that he had saved anyone during the genocide.⁴⁰⁷

Furthermore, Kagame has demonstrated by his actions that he does not agree with the international community’s views as to which persons or what actions should be punished. Kagame was active in blocking the ICTR’s potential prosecutions of RPF soldiers, and while some soldiers have been prosecuted domestically, Kagame has stated that he does not view those crimes as deserving of the same treatment or punishment as those who committed the genocide. And, he defends against allegations that he is wrongly allowing impunity to reign by failing to fully prosecute RPF crimes.

In fact, an examination of Rwanda’s relationship with the world community in connection with the ICTR provides further evidence supportive of the credible threat theory – as opposed to the credible commitment theory. Rwanda’s actions show that it wanted a tribunal that was more or less under its control, and when the tribunal was not structured in the way it preferred, it declined to vote for its creation. It continued to show that it wanted control over the ICTR even after it was created. When the tribunal did not move quickly enough, when it did not treat Rwanda’s witnesses as Rwanda would have expected, and when it turned its sights on investigating RPF crimes, Rwanda and its people voiced their displeasure and even ceased cooperating with the tribunal.

Because the evidence shows that Rwanda was frustrated with the ICTR experience and how the world community sought to control how Rwanda dealt with the perpetrators of the genocide, it makes sense that Rwanda would not join an institution like the ICC over which it

⁴⁰⁶ Paul Rusesabagina, “Compendium Of RPF Crimes – October 1990 To Present: The Case For Overdue Prosecution,” Brussels, November 2006.

⁴⁰⁷ Kinzer, *A Thousand Hills*, 245-46.

could not expect to have control. And, because Rwanda's human rights practices and domestic law enforcement institutions have been, and still are, poor and criticized by the world community, Rwanda has reason to focus on the credible threat posed by the ICC's relatively strong enforcement mechanisms. It makes little sense to suggest that Rwanda would join the ICC to demonstrate its credible commitment to end any cycle of violence when the facts show that Rwanda's autocratic leader does not otherwise impose domestic constraints on his ability to rule as he sees fit – even if that means resorting to force and violence. Instead, because compliance with the ICC treaty would be difficult, Rwanda has acted rationally in being wary of the credible threat posed by the ICC's relatively strong enforcement mechanisms, rather than embracing those enforcement mechanisms so as to credibly commit to change its behavior – or risk being the subject of an international prosecution.

Not only is Rwanda's behavior in refusing to commit to the ICC not consistent with the credible commitment theory, but its behavior is also not explained by the normative theories about state ratification of international human rights treaties. For example, even though more than half of the countries in Africa have committed to the ICC, and even though according to the OECD, Rwanda is classified as one of the world's poorest countries, Rwanda has not bowed to any actual or implied pressure to act "appropriately" and ratify the ICC so as to be perceived as a legitimate state deserving of rewards like aid and trade. Rwanda has relationships with countries in Europe and Africa – many of whom have joined the court. In fact, in 2009, Rwanda further strengthened its relationship with Britain and other countries by becoming a member of the British Commonwealth.⁴⁰⁸ In addition, for the years between 1997 and 2007, the European

⁴⁰⁸ "Rwanda admitted to Commonwealth," BBC News, November 29, 2009, available at <http://news.bbc.co.uk/2/hi/8384930.stm>.

Union and Kenya have been Rwanda's top two exports markets.⁴⁰⁹ Yet, Rwanda has not joined the ICC even though the countries from which it receives much of its trading income are members.

It is true that Rwanda did sign a bilateral immunity agreement with the United States during the time period in which the United States was a vocal opponent of the ICC. However, that agreement was a reciprocal one in which the United States also promised not to surrender any Rwandan citizen to an international tribunal unless both countries were parties to an international agreement obligating them to do so.⁴¹⁰ In addition, the statement Rwanda made about signing the agreement only provides more support for the idea that Rwanda is approaching the ICC as a self-interested rational actor focused on the costliness of treaty commitment – in this case, the fact that the ICC could infringe on Rwanda's sovereign right to prosecute its own citizens domestically. President Kagame stated: "Well, we thought first of all, we have to deal with some of these cases that require such a treatment where if the United States, for example, had a case that it's interested in, of their citizen to be tried in the United States, we respect that. And I'm sure if we had our own citizen who has committed an offense of a criminal nature, that we would have interest in, it would be interesting to us for the United States, where that is possible, for the United States to hand over such a person."⁴¹¹

In conclusion, Rwanda's actions in refusing to join the ICC are consistent with the credible threat theory. The evidence shows that Rwanda closely guards its sovereignty and is distrustful, and even disdainful, of the international community. It particularly guards its

⁴⁰⁹ United Nations Conference on Trade and Development, "Rwanda's Development-Driven Trade Policy Framework," prepared by the United Nations Conference on Trade and Development and the Ministry of Trade and Industry of Rwanda, 2010.

⁴¹⁰ Agreement Between the Government of the United States of America and the Government of Rwanda Regarding the Surrender of Persons to International Tribunals," available at <http://www.amicc.org/docs/US-Rwanda.pdf>.

⁴¹¹ "Stakeout Media Availability With Paul Kagame, President of Rwanda, Following His Meeting With President Bush," Federal News Service, March 4, 2003.

sovereign rights to govern as it deems necessary, even if that means that it may have to use force to bring order, peace, and stability to the country. In addition, the evidence shows that Rwanda is protective of its right to mete out justice within its borders. It has shown that it wants to exercise control over the trials of those who committed the 1994 genocide, and it even abolished the death penalty and made other changes to its judiciary system so that it may be allowed to receive cases transferred from the ICTR. Furthermore, it has shown that it wants to decide – without input from the international community – what suspects and what crimes should be punished. Notwithstanding harsh criticism from some in the international community, the Rwandan government has refused to consider RPF crimes as deserving of the same level of punishment as those who committed genocide. Given this evidence, and the fact that Rwanda has poor human rights practices and poor domestic law enforcement institutions, it is rational for Rwanda to conclude that joining an institution like the ICC with its relatively strong enforcement mechanisms would impose sovereignty costs that are simply too high to accept.

Nor do Rwanda's very recent comments about the ICC suggest that it will be joining the institution in the near future. Rather, its comments simply serve to confirm that it is aware of the ICC's enforcement mechanism, but does not trust that the institution operates, or will operate, fairly. Rwanda knew that Sudanese President Omar Al-Bashir was the subject of an arrest warrant issued by the ICC, yet it defended Kenya's decision to allow Al-Bashir to attend a ceremony celebrating the passage of a new constitution – even though, as a member of the ICC, Kenya had an obligation to arrest Al-Bashir. Rwanda's Minister of Foreign Affairs, Louise Mushikiwabo, stated: “Rwanda totally supports the position of the sister nation, Kenya and the presence of Bashir in Kenya. We need to look at the larger issue of universal jurisdiction and ICC in relation to Africa and Africans in particular. . . . As far as my government is concerned,

this has nothing to do with whether Bashir is innocent or guilty of the crimes he is accused of; it is about Africans getting the respect they deserve. ICC is a good instrument. We are not against it but against only Africans being targeted. . . Justice doesn't walk in a vacuum. Justice is to bring order and not to create chaos to satisfy the international community. Kenya is [involved] in efforts to stabilize Sudan. Rwanda supports the AU decision on the ICC.'”⁴¹²

⁴¹² James Karuhanga, “Africa: Mushikiwabo Defends Kenya’s Decision to Invite Bashir,” The Newtimes, Sept. 3, 2010, <http://allafrica.com/stories/printable/201009030321.html>.

CHAPTER NINE

KENYA: HOPE BECOMES REGRET?

This chapter examines Kenya's decision to commit to the ICC notwithstanding its history of poor human rights practices and weak domestic law enforcement institutions. While under the leadership of long-time President Daniel arap Moi, Kenya signed the ICC treaty on August 11, 1999 – only about one year after the treaty was available for signature. Kenya's ratification, however, came much later – on March 15, 2005 – under the leadership of Kenya's current ruler, President Mwai Kibaki.

Unlike Rwanda's failure to readily commit to the ICC, Kenya's commitment to the ICC in 2005 is not consistent with the credible threat theory inasmuch as the data suggest that Kenya's costs of complying with the ICC treaty and the risks to its sovereignty by joining the ICC have been, and continue to be, significant. For example, between 1994 and 2007, Kenya has scored between 1 and 4 on the physical integrity rights scale. Since 2005 – the year Kenya ratified the ICC treaty – it has scored a 3 on the scale. Furthermore, in addition to having a history of poor human rights practices, Kenya – like Rwanda – also appears to lack the kinds of institutions that would enable it to fairly and capably prosecute mass atrocities domestically. Between 1996 and 2008, Kenya's rule of law ratings have averaged approximately -1.00. Other evidence also indicates that Kenya's domestic law enforcement capacity has been, and continues to be, weak. A Special Rapporteur for the United Nations pointed to the “terrible” Kenyan criminal justice system, at least in part, to explain why police could murder with impunity. He noted that the investigation, prosecution, and judicial processes in Kenya are slow and corrupt.⁴¹³ Therefore, if Kenya had perceived the ICC treaty's relatively strong enforcement mechanisms as

⁴¹³ See Philip Alston, “Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Kenya, May 26, 2009,” at ¶ 23, 16-17.

a credible threat, even in 2005, rational retrospective cost calculations should have caused it to refuse to commit to the Rome Statute because the fact of its poor human rights practices and weak domestic law enforcement institutions indicated that it might not be able to comply with treaty terms.

Indeed, this case study of Kenya well illustrates the perils a state may encounter when it commits to an international human rights treaty with relatively strong enforcement mechanisms, but where the facts show that compliance with treaty terms may be difficult. In November 2009, the ICC's Prosecutor Luis Moreno-Ocampo for the first time used his *proprio motu* powers and sought authorization to open an investigation into the violence that occurred after the 2007 election of President Kibaki.⁴¹⁴ More than 1000 people died – and some 300,000 were displaced – during the course of ethnically charged violence that erupted after President Kibaki was declared the winner of the December 2007 elections which challenger Raila Odinga and his supporters argued were rigged.⁴¹⁵ Although the ICC Prosecutor had given Kenya numerous opportunities to avoid an ICC prosecution by establishing a local tribunal to try those responsible for the violence, after Kenya's parliament failed to pass a bill establishing a tribunal, the ICC granted the Prosecutor's request to proceed.⁴¹⁶ By an order dated March 31, 2010, the ICC authorized the Prosecutor to launch an investigation into the crimes against humanity which allegedly occurred during the course of Kenya's 2007 post-election violence.⁴¹⁷ On December 15, 2010, Prosecutor Moreno-Ocampo announced his intention to charge six prominent Kenyans from Kibaki's and Odinga's political parties with having committed crimes against humanity for

⁴¹⁴ "ICC Opens Kenya Investigation," CICC Update, March 31, 2010; "ICC Judges Grant Prosecutor's Request to Launch Investigation in Kenya," ICC Press Release, March 31, 2010.

⁴¹⁵ Tristan McConnel, "International prosecutor in Kenya to press charges," Globalpost, May 13, 2010, <http://www.globalpost.com/dispatch/kenya/100512/international-criminal-court-nairobi>.

⁴¹⁶ Sammy Cheboi, "UN official urges Kenya on local tribunal," Daily Nation, June 7, 2010, <http://www.nation.co.ke/News/-/1056/933700/-/view/printVersion/-/c5car0/-/index.html>.

⁴¹⁷ "ICC Opens Kenya Investigation," CICC Update, March 31, 2010.

their roles in organizing the post-election violence.⁴¹⁸ Apparently, the sovereignty costs associated with complying with the ICC treaty became overwhelmingly clear to some in Kenya after the Prosecutor announced his list of suspects: immediately, a member of Kenya's parliament put forth a motion to withdraw from the ICC.⁴¹⁹ And, even though the country has not to date withdrawn from the ICC, it continues its efforts to stop the ICC's processes vis-à-vis the six Kenyans charged with committing crimes against humanity.⁴²⁰

But, even though Kenya's decision to commit to the ICC in 2005 is not consistent with the credible threat theory, I suggest that in the years both before and after ratification, Kenya's behavior is consistent with that theory. As noted above, although Kenya promptly made the costless decision to sign the Rome Statute, it waited another six years to actually ratify the treaty. By its participation in Rome Conference negotiations, Kenya knew of the content of the ICC's enforcement mechanisms and that states had agreed to create a strong and independent court and prosecutor. And, for the following six years – during all of which Kenya had poor human rights practices and weak domestic law enforcement institutions – Kenya refused to make the costly decision of committing to the ICC treaty. That costs likely explains Kenya's decision during this time period to refrain from ratifying the ICC is supported by other evidence as well. In fact, Kenya has consistently refused to commit to international human rights treaties with any but the weakest enforcement mechanisms.

In addition, Kenya's behavior post-ratification is consistent with the credible threat

⁴¹⁸ Steve Inskip, "ICC Case Accuses 6 Prominent Kenyans of Violence," NPR, December 16, 2010; Collins Mbalo, "Kenya: ICC Prosecutor Names 2008 Post Election Violence Suspects, Global Voices Online, December 16, 2010.

⁴¹⁹ Michael Onyiego, "Kenya's Politicians Look to Withdraw from ICC as Suspects Named," VOANews.com, December 16, 2010.

⁴²⁰ Emeka-Mayaka Gekara, "Kenyan security chiefs' bid to suspend Ocampo probe fails," Daily Nation, February 9, 2011; Samuel Kumba, "Kenya's bid to defer ICC cases faces more hurdles," Daily Nation, February 9, 2011; Oliver Mathenge, "Rough road ahead as Kenya plans to lobby UN's Big Five," Daily Nation, February 9, 2011; Michael Onyiego, "Kenya Seeks Another Way to Stall Hague Proceedings," VOANews.com, March 21, 2011. .

theory inasmuch as Kenya has shown that it does not now want to be bound to a treaty that it now knows only too well is imposing significant costs on its sovereignty. As described in more detail below, the record shows a government that in the aftermath of the 2007 post-election violence is intent on ensuring that impunity reigns. The Kenyan government has not prosecuted those most responsible for the violence.⁴²¹ In addition, it refused to follow the ICC's recommendations and set up a Special Tribunal within Kenya to try perpetrators.⁴²² Furthermore, there is evidence to suggest that Kenya is not fully cooperating with the ICC Prosecutor's efforts to gather evidence.⁴²³ Finally, immediately after the Prosecutor named the six suspects that he intended to try in The Hague, Kenya's parliament voted overwhelmingly to withdraw from the ICC.⁴²⁴ Of course, now that the ICC has demonstrated that it will enforce compliance with treaty terms and try perpetrators of mass atrocities where States Parties fail to act, those same Kenyan legislators now argue that it would be better to establish a local tribunal to try perpetrators – something they could have done years ago.⁴²⁵ In short, because Kenya is either unwilling or unable to comply with the terms of the Rome Statute, and because it is only too aware of the ICC's enforcement mechanisms, it is now acting consistently with the credible threat theory and seeking to avoid its commitment to the court.

Even though Kenya's 2005 ratification is not consistent with the credible threat theory, however, the evidence also discredits the power of the credible commitment theory to explain Kenya's behavior. Kenya is a state with a history of poor human rights practices and a history of civil violence. Accordingly, it could be amongst the states whose ICC ratification behavior

⁴²¹ ICC Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," (March 31, 2010), ¶¶ 183-86, available at <http://www.icc-cpi.int/iccdocs/doc854287.pdf>.

⁴²² Jeffrey Gettleman, "Kenya's Bill for Bloodshed Nears Payment," The New York Times, July 16, 2009.

⁴²³ Michael Onyiego, "Legal Challenges Threaten to Undermine ICC Investigation in Kenya," VOANews.com, Oct. 4, 2010.

⁴²⁴ Sarah Wambui, "Anger over MPs vote against ICC," Capital News, Dec. 25, 2010.

⁴²⁵ Sarah Wambui, "Anger over MPs vote against ICC."

could be explained by the credible commitment theory. In fact, according to a Human Rights Watch report, Kenya has often experienced ethnic violence leading up to or following elections inasmuch as candidates are elected not so much for their unique political ideology, but instead along ethnic lines. It reports that some of the worst episodes of violence occurred between 1991 and 1993 when President Moi stirred up ethnic violence against the Kikuyu in the Rift Valley so as to consolidate his favorable votes among the Kalinjin people once they had driven out the Kikuyu. That violence resulted in some 1500 dead and another 300,000 displaced.⁴²⁶ Under the credible commitment theory, one might have expected that President Moi – an authoritarian ruler – would have joined the ICC so as to credibly commit to end the cycle of violence. But, he only signed the ICC treaty – establishing that he did not embrace the ICC’s strong enforcement mechanisms. Of course, I suggest that Moi’s refusal to commit to the ICC is not surprising: as an authoritarian leader, he did not want to impose any domestic constraints on his power to do as he wished; therefore, it would make little sense for him to impose international constraints on his power.

Rather, and further discrediting the explanatory power of the credible commitment theory, Kenya ratified the ICC treaty only after it had purportedly transitioned to a democracy under the leadership of President Kibaki.⁴²⁷ According to Simmons’ and Danner’s logic, *democratic* states with poor human rights practices and a recent history of civil violence should

⁴²⁶ Human Rights Watch, Ballots to Bullets, “Organized Political Violence and Kenya’s Crisis of Governance,” March 2008, 18.

⁴²⁷ In December 2001, President Kibaki was elected President to replace President Moi who had ruled the country as an autocracy since 1978. Kibaki came to power based on a platform that promised, among other things, constitutional reforms to limit presidential power, judicial reforms, and an end to the pervasive corruption which had characterized Moi’s government and which the populace blamed for Kenya’s economic woes. Andrew England, “New president of Kenya vows to end ‘malaise:’ Kibaki sworn in, pledges to undo years of corruption,” The Chicago Tribune, December 31, 2002; “Democracy in Kenya,” The Register Guard, December 31, 2002. Until President Kibaki’s victory in 2002, Kenya typically scored a 0 on the democracy scale which ranges from 0 to 10. Although Kibaki has been roundly criticized for failing to deliver his promised reforms, or for failing to deliver some as promptly as he said he would, since Kibaki has been president, the country has scored a 7 or 8 on that scale.

avoid committing to the ICC because they have domestic institutions – such as a civil society and courts that adhere to the rule of law – which can ensure leaders would be held accountable for any future acts of violence.⁴²⁸ Of course, although civil society’s role in Kenya’s governance has increased since Kibaki’s reign,⁴²⁹ Kenya’s continued weak rule of law ratings indicate that its domestic institutions may not be independent enough or capable enough to fairly dispense justice. Nor does the anecdotal evidence indicate there are strong domestic institutions that could hold President Kibaki accountable should he resort to violence. Indeed, although he may not have participated in the 2007 post-election violence, Kibaki was the country’s disputed leader while that violence in which his security forces participated was ongoing,⁴³⁰ and his government has allegedly failed to hold any high-level perpetrators accountable for the violence they inflicted during the riots.⁴³¹

Accordingly, perhaps even under Kibaki’s reign, one might characterize Kenya as a non-democracy with a history of civil violence and a country that should embrace joining the ICC so as to credibly commit to end Kenya’s cycle of violence and the impunity that accompanies such violence. But, even so, the credible commitment theory fails to explain Kenya’s decision to join the ICC in 2005. Again, the fact of the 2007 post-election violence; the fact that Kibaki’s allegedly rigged election prompted the violence; and the fact that Kibaki’s police forces allegedly committed many crimes during the riots for which they have not been held accountable

⁴²⁸ Human Rights Watch, *Ballots to Bullets*, “Organized Political Violence and Kenya’s Crisis of Governance,” March 2008, 24.

⁴²⁹ For example, by an Act of Parliament in late 2002, in 2003, Kenya established the Kenya National Commission of Human Rights (“KNCHR”) to act as a watchdog over the government in order to further the protection and promotion of human rights in Kenya.

⁴³⁰ United Nations High Commissioner for Human Rights, Report from OHCHR Fact-finding Mission to Kenya, 6-18 February 2008, 8-11; Amnesty International, “Kenya: Amnesty International Condemns Excessive Use of Force by Police,” Jan. 18, 2008.

⁴³¹ Amnesty International, “Human Rights In Republic Of Kenya 2009,” available at <http://www.amnesty.org/en/region/kenya/report-2009> (noting the Kenyan government’s failure to prosecute acts of violence committed in the aftermath of the 2007 elections).

all suggest that Kenya does not want to commit to end any cycle of violence.⁴³² Furthermore, the facts immediately after Kenya committed to the ICC show that Kibaki did not want to be held accountable domestically, and there is no reason to believe he wants to be held accountable by the ICC. Indeed, only months after Kenya committed to the ICC, Kibaki proposed a new constitution – but it was one that the voters overwhelmingly rejected because by it, Kibaki refused to release his stronghold on executive power.⁴³³ Thus, whether one characterizes Kenya as a democracy or a non-democracy, the facts still do not support the explanatory power of the credible commitment theory to explain Kenya’s ICC ratification behavior.

This chapter is organized as follows. First, by way of background, I examine Kenya’s transition from the leadership of President Moi to that of President Kibaki. I then look at Kenya’s behavior in connection with other international human rights treaties in an effort to generate a more complete picture of what factors influence its commitment decisions. Next, I trace Kenya’s participation in the creation of the ICC, and its decisions to sign and later ratify the Rome Statute. The following section examines Kenya’s compliance with ICC treaty terms, addressing in particular the 2007 post-election violence, the ICC’s investigation of that violence, and the government’s responses to it. Finally, I assess the credible threat theory and other competing theories in light of Kenya’s behavior up to and following ratification of the Rome Statute and explore how and whether each is able to explain that behavior. I conclude that although Kenya’s decision to ratify the ICC treaty in 2005 is not consistent with the credible

⁴³² According to the ICC’s decision authorizing the ICC Prosecutor’s Investigation into Kenya’s post-election violence, about 37% of the killings were caused by police forces. ICC Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” March 31, 2010, ¶ 106 and fn. 110, available at <http://www.icc-cip.int/iccdocs/doc854287.pdf>. In addition, although there is no clear evidence that Kibaki participated in the attacks, the ICC Prosecutor named Kibaki’s Secretary to the Presidency, Francis Muthaura, as one of his six suspects, a fact which has led some to argue shows that Moreno-Ocampo “came close to laying the gauntlet at the doorstep of President Kibaki.” “Kenya runs out of options as Ocampo strikes,” *The Standard*, Dec. 23, 2010.

⁴³³ Michela Wrong, *It’s Our Turn to Eat: The Story Of A Kenyan Whistleblower* (Fourth Estate: London, 2009), 241-45.

threat theory, in the years both before and after ratification, Kenya's acts have been consistent with those of a rational state concerned with compliance costs. Simply put, Kenya did not immediately ratify the Rome Statute, and now that the strength of the treaty's enforcement mechanisms is all too obvious, many in the Kenyan government have indicated they want to withdraw from the treaty – or at least stop the ICC's processes.

Background: Kenya's Transition from the Moi to the Kibaki Presidency

For some 24 years prior to December 2002, Kenya was ruled as an autocracy by President Daniel arap Moi, leader of the Kenyan African National Union ("KANU"). Moi is charged with being responsible for Kenya's abject poverty because of his administration's endemic corruption and plunder of state resources. In addition, as noted above, under Moi, Kenya's human rights practices and the quality of its domestic law enforcement institutions were both poor. Human Rights Watch reports issues with personal security resulting from, among other things, police brutality. In terms of the judiciary, not only was it accused of taking bribes, but also the president's power over the judiciary allowed executive interference with its operations and decisions.⁴³⁴ In addition, as noted above, since the restoration of multi-party politics in 1991, significant ethnic-based violence accompanied Moi's electoral wins in 1992 and 1997. Human Rights Watch reports that during the 1990s, at least 2000 people were killed and some 400,000 displaced in politically-motivated violence directed at ethnic groups perceived to support Moi's opponents. Although high-ranking party officials evidently directly instigated the violence, Moi generally allowed impunity to reign and refused to punish the instigators.⁴³⁵

⁴³⁴ Human Rights Watch, "Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government," 1-4, 7-8, available at <http://www.hrw.org/legacy/reports/2002/kenya2/>.

⁴³⁵ United Nations High Commissioner for Human Rights, Report from OHCHR Fact-finding Mission to Kenya, 6-18 February 2008, 5; Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance," March 2008, 6; Human Rights Watch, "Playing With Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya," 1-2, available at <http://hrw.org/reports/2002/Kenya>.

In 2002, Kibaki came to power on a platform promising sweeping constitutional and judicial reforms and pledging to put an end to the endemic corruption that had characterized Moi's administration.⁴³⁶ However, although after Kibaki's victory Kenya has been characterized as a democracy, the promised reforms were often delayed or – in some cases – not forthcoming. According to a 2008 Human Rights Watch report, “[d]espite a promising start – which included improvements in freedom of expression and association coupled with strong economic growth – corruption,⁴³⁷ patronage politics, state-sponsored violence, and persistent police abuses have defined the order of the day.”⁴³⁸ Moreover, the constitution limiting presidential powers that Kibaki promised to deliver within 100 days of assuming the office of president was actually not delivered until August 2010. Kibaki did present a draft constitution in 2005, but that constitution included a non-executive prime minister who was subservient to the president. As a result, the 2005 draft constitution was rejected by voters.⁴³⁹ Kibaki's response to that rejection only served to further demonstrate his reluctance to deliver on his campaign promise to limit presidential power since he thereafter dismissed his entire cabinet – including all of those who supported his opponent and present Prime Minister, Raila Odinga (a man who had helped get Kibaki elected in 2002).⁴⁴⁰

⁴³⁶ Kibaki actually served for many years under Moi's leadership as, among other things, Vice President and Minister of Finance. However, in 1991, when multi-party politics again became allowed, Kibaki resigned from government and the KANU party and founded the Democratic Party. Kibaki competed in the presidential elections of 1992 and 1997, losing both times to Moi. Kibaki, however, was the landslide winner of the 2002 elections, having been elected as the presidential candidate for the recently formed coalition party – the National Rainbow Coalition (“NARC”).

⁴³⁷ Although Kibaki himself has not been personally accused of corruption, his very own corruption czar, John Githongo, resigned his position only several years after being appointed and went on to expose many in the government for participating in widespread corruption. Michela Wrong, *It's Our Turn to Eat*.

⁴³⁸ Human Rights Watch, *Ballots to Bullets*, “Organized Political Violence and Kenya's Crisis of Governance,” (March 2008):12.

⁴³⁹ Human Rights Watch, *Ballots to Bullets*, “Organized Political Violence and Kenya's Crisis of Governance,” March 2008, 17-18.

⁴⁴⁰ Michela Wrong, *It's Our Turn to Eat*, 241-45.

Kenya's Participation in the International Human Rights Regime: Avoiding Costly Commitment

In the context of Kenya's conduct vis-à-vis other international human rights treaties, Kenya's decision to ratify the Rome Statute in 2005 is somewhat unusual since the country typically avoids international human rights treaties with stronger enforcement mechanisms. As shown in Table 23, Kenya has ratified only those treaties with the weakest enforcement mechanisms – those that require the state to self-report its compliance. Thus, even if it cannot comply with treaty terms – and Kenya may not be able or willing to comply with them based on its human rights ratings – Kenya faces no real consequences for committing to the six treaties listed below. That Kenya has otherwise refused to ratify any of the other treaties with stronger enforcement mechanisms suggests that Kenya typically avoids costly commitment and risks to its sovereignty: it avoids treaties with which it may not be able to comply where the enforcement mechanisms may result in a situation where Kenya could be punished for its non-compliance.

Table 23: Commitment to the Six Primary International Human Rights Treaties

Treaty	Enforcement Mechanism	Date Open	Ratification Date
ICCPR	Reports	1966	1972
ICESCR	Reports	1966	1972
CERD	Reports	1966	2001
CEDAW	Reports	1980	1984
CAT	Reports	1984	1997
CRC	Reports	1989	1990
ICCPR Art. 41	State Complaints	1966	--
CAT Art. 21	State Complaints	1984	--
ICCPR Opt.	Individual Complaints	1966	--
CERD 14	Individual Complaints	1966	--
CAT 22	Individual Complaints	1984	--
CEDAW Opt.	Individual Complaints	1999	--
CAT Opt.	Committee Visits	2003	--

In sum, when considered in the context of its ratification behavior concerning other international human rights treaties, Kenya’s decision to ratify the ICC seems less than rational – and inconsistent with the credible threat theory. Because Kenya had poor human rights practices and weak domestic law enforcement institutions, all indications were that compliance with ICC treaty terms would be difficult and costly.

Kenya’s Commitment to the ICC: Rationality Succumbs to Pressure

Kenya did participate in the negotiations leading up to the adoption of the Rome Statute, and although the few records of its statements indicate that it supported the idea of a court, it was more inclined to favor fewer powers for the prosecutor. Summary records of the proceedings at the Rome Conference show that Kenya’s Head of Delegation and Attorney General, Mr. Wako, “reaffirmed Kenya’s commitment to the establishment of an effective, impartial, credible and independent international criminal court, free from political manipulation, pursuing only the

interests of justice, with due regard to the rights of the accused and the interests of the victims” and stated that his delegation would support all efforts to seek consensus on the establishment of the court.⁴⁴¹ He further referenced the central importance of the principle of complementarity which would allow the ICC to act only where national criminal justice systems “were not available or were ineffective.”⁴⁴² However, in the case of *proprio motu* powers for the prosecutor, Kenya’s Mr. Kandie stated that his delegation saw no reason why the prosecutor should have such powers inasmuch as the twin triggers of state and Security Council referrals (subject to appropriate controls) should be sufficient to cover all cases that would need to go before the court.⁴⁴³ Mr. Mwangi of Kenya said that while his delegation was prepared to support automatic acceptance by states of jurisdiction over the core crimes upon ratification, his delegation “continued to doubt the desirability of conferring *proprio motu* powers” on the prosecutor since he might be subject to political pressures. However, Mr. Mwangi stated that his delegation would not stand in the way of a consensus on the issue.⁴⁴⁴

But, making statements during treaty negotiations – and even signing international human rights treaties – does not subject states to compliance costs. Thus, even though Kenya’s representatives made statements during negotiations indicating their support for the establishment of a strong and independent ICC with the goal of ending impunity for perpetrators of mass atrocities, and even though Kenya signed the Rome Statute in August, 1999, none of those acts bound Kenya to comply with the terms of the ICC treaty. Rather, the fact that Kenya did not ratify the Rome Statute during Moi’s reign is consistent with the credible threat theory.

⁴⁴¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Summary records of the plenary meetings and of the meetings of the Committee of the Whole,” June 15 – July 1, 1998, A/Conf.183/13 (Vol. II), June 16, 1998, 77 at ¶ 63.

⁴⁴² Ibid. at 77, ¶ 64 (June 16, 1998).

⁴⁴³ Ibid. at 199, ¶ 92 (June 22, 1998).

⁴⁴⁴ Ibid. at 317, ¶ 33 (July 9, 1998).

First, Kenya knew of the ICC treaty's relatively strong enforcement mechanisms in the form of an independent court and prosecutor. In fact, it voiced objections to granting the prosecutor the strong *proprio motu* powers that states eventually agreed on at the conclusion of the Rome Conference. Because at the time of the Rome Conference and for years thereafter, Kenya was an authoritarian state with poor human rights practices, poor domestic law enforcement institutions, and a reputation for government-sponsored violence that went unpunished, it makes sense that the country would not want to commit to a treaty like the Rome Statute with relatively strong enforcement mechanisms.

In any event, there is little reason to believe that the statements Kenya made during Rome Statute negotiations reflected Kenya's sincere commitment to embrace an international norm aimed at ending impunity. In this vein, it is interesting to note that Kenya's Head of Delegation during the Rome Statute negotiations, Mr. Wako, has been Kenya's Attorney General from 1991 to the present. Accordingly, he has been Kenya's top law enforcement official during these many years that Kenya has had poor human rights practices, a corrupt government, and institutions that allow impunity to reign. He has been Kenya's top law enforcement official during all of the violent election-related clashes that have occurred since Kenya began allowing multi-party politics in 1991. And, although he spoke during negotiations of Kenya's commitment to a strong and independent court to punish impunity, even recently he has been criticized for failing to end Kenya's cycle of impunity and accused of being an obstacle in the country's fight against corruption. In fact, in October 2009, the United States banned Attorney General Wako from traveling to the United States, citing these very same criticisms and alleging that he has been responsible for deliberately blocking political reforms following the 2007 post-

election violence.⁴⁴⁵ Although Mr. Wako denies the allegations, the very fact that he has been the country's top law enforcement official during many years of violence and impunity tends to suggest that his words during Rome Conference negotiations were more in the nature of "empty promises."⁴⁴⁶

In March 2005, however, and despite the fact that its human rights ratings and rule of law ratings remained poor, Kenya ratified the Rome Statute. Although one may never know exactly why Kenya decided to ratify the treaty at that time, for the most part its decision to do so – given its poor prospects for compliance – is not consistent with the credible threat theory. It is true that after Kibaki was elected, Kenya began being classified as a democracy, rather than an autocracy. And, it is true that Kibaki was elected based on a platform that promised democratic reforms, an end to corruption, and greater respect for the rule of law. But, although this evidence may have suggested a potential for compliance, the bulk of the evidence does not suggest that at the time of ratification, Kenya had fully committed to bettering its practices so as to ensure its compliance with ICC treaty terms and its norms against ending impunity. As noted above, although Kibaki had promised to promptly deliver a new constitution that would limit executive powers, he did not deliver a new constitution until late 2005, and the constitution he delivered did not limit presidential powers. These actions, which occurred after the ratification of the ICC treaty, do not suggest a leader who is truly committed to democratic reforms. And, of course, as described in more detail below, the record otherwise also indicates that Kenya had little intention of complying with the ICC treaty. The facts suggesting that Kibaki rigged his own 2007 election and the fact that he was the leader at the time of the post-election violence which involved his own security forces are proof that Kibaki was not committed to democratic practices or

⁴⁴⁵ "Banned Kenya official 'to sue' US," BBC News, Nov. 4, 2009, <http://news.bbc.co.uk/2/hi/africa/8343088.htm>.

⁴⁴⁶ Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World," 1374.

improving Kenya's human rights practices.

But, if Kenya was unable to, or did not intend to, comply with ICC treaty terms, why would it commit to a treaty that had strong enforcement mechanisms which could be invoked to punish it – with great costs to its sovereignty – for failing to comply? One answer, of course, is that Kenya did not view the Rome Statute's enforcement mechanisms as a credible threat. But, this answer is less than satisfying. After all, Kenya did participate in negotiations and was aware of treaty terms. Also, that Kenya understands the potential threat of stronger enforcement mechanisms is evidenced by the fact that it has not ratified any of the main international human rights treaties with enforcement mechanisms beyond self-reporting. Finally, by the time Kenya ratified the ICC treaty, it knew the ICC had already commenced some cases – although the prosecutor had not yet commenced a case using his *proprio motu* powers. Prior to March 2005, in fact, all of the other four situations before the ICC had already been referred to the court, including the Security Council's referral of the situation in Darfur, Sudan.⁴⁴⁷

On the other hand, normative pressure may have helped prompt Kenya to commit to the ICC when it did and despite the treaty's relatively strong enforcement mechanisms. There is evidence that Kenya was subjected to considerable domestic and international lobbying designed to persuade it to commit to the Rome Statute – particularly after Kibaki became President. After all, Kibaki and his government had claimed to be democratic reformers and interested in improving human rights, and refusing to commit to the ICC might be viewed as contrary to such a reformist agenda. Indeed, in October 2004, the Kenya National Commission on Human Rights sponsored a forum to raise awareness about the importance of the ICC and other institutions. In January 2005, the CICC and its members chose Kenya as its target country on which to focus its

⁴⁴⁷ See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/>.

ICC ratification efforts.⁴⁴⁸ Among other things, the CICC referenced Kenya's role as a peace-builder in Africa and suggested that Kenya's ratification of the ICC would send an "important to signal to other African states who have yet to ratify about Africa's growing commitment to international justice and the rule of law."⁴⁴⁹ Furthermore, by 2005, some 26 other African countries were already ICC members, a fact which some argued reflected badly on Kenya's image.⁴⁵⁰ And, after Kenya ratified the ICC treaty, it was praised for sending a strong message that it will make a break from its past cycle of impunity.⁴⁵¹

As discussed in more detail below, however, Kenya's post-ratification behavior does not demonstrate that it was committed to breaking from its past cycle of impunity. The evidence instead suggests that Kenya may have succumbed to normative pressure to ratify the ICC treaty, but without committing to the required normative changes that would allow it to comply with treaty terms.

Kenya's Commitment to the ICC Post-Ratification: Mainly a Record of Non-Compliance

The Refusal to Sign a Bilateral Immunity Agreement

One fact which may have suggested the sincerity of Kenya's intention to comply with the ICC's terms was its refusal to bow to United States pressure to sign a bilateral immunity agreement. Apparently the United States had sought Kenya's signature on an immunity agreement since 2003, threatening to suspend a military aid package of approximately \$9.8

⁴⁴⁸ CICC, "Global Coalition Calls on Kenya to Ratify International Criminal Court Treaty: As Conflicts Rage in Neighboring Countries, Kenya's Ratification Can Offer Beacon of Hope," Jan. 11, 2005.

⁴⁴⁹ CICC, "Kenya: Urge the government to ratify the Rome Statute of the International Criminal Court," January 2005.

⁴⁵⁰ Godfrey O. Ogongo, "ICC: Kenya Narrowly Avoids 'Criminal Haven' Image," East African, April 18, 2005, available at 2005 WLNR 6529753.

⁴⁵¹ Kenya National Commission on Human Rights, "Ratification of International Criminal Court is an Essential Pillar for Securing the Rights of Kenya," available at http://www.knchr.org/index.php?option=com_content&task=view&id=23&Itemid=89.

million should Kenya refuse to sign.⁴⁵² However, The United States stepped up its pressure to get Kenya to sign an immunity agreement after Kenya ratified the ICC in March 2005. Although Kenya purportedly initially looked favorably on the agreement, it ultimately succumbed to domestic and international groups which were beseeching Kenya not to sign. Among other things, those groups stressed Kenya's sovereignty, but also the fact that signing the agreement would contradict its obligations under the Rome Statute.⁴⁵³ Kenya's decision to withstand United States pressure was well-received by the international community: the CICC sent a letter to President Kibaki stating that "Kenya's decision to uphold its commitment to the ICC treaty and to the concept of equality of all before the law despite the threatened loss of US aid 'exemplifies a victory of principle over brute power.'"⁴⁵⁴

Thus, in the early days after ratification, the fact of Kenya's refusal to sign a bilateral immunity agreement could be viewed as evidence that Kenya was normatively committed to the court and intended to abide by its obligations under the Rome Statute. That piece of evidence suggesting an intention to comply, however, it generally outweighed by the evidence which tends to demonstrate a lack of normative commitment to ending impunity.⁴⁵⁵ First, even Kenya's refusal to sign the immunity agreement eventually became irrelevant. In January 2009, the United States waived the prohibitions on aid to Kenya on the grounds that supporting Kenya

⁴⁵² Fred Oluoch, "Kenya: Will Kibaki Succumb To U.S. Pressure?," New African, Aug./Sept. 2005, http://findarticles.com/p/articles/mi_qa5391/is_200508/ai_n21377670/.

⁴⁵³ Fred Oluoch, "Kenya On Collision Course With U.S. On ICC Treaty," East African, April 25, 2005, available at 2005 WLNR 6529705.

⁴⁵⁴ CICC Press Release, "Global Coalition Voices Support for Kenya's On-Going Resistance to U.S. ICC Immunity Agreement: Kenya's Firm Stand in Defending ICC Integrity is Welcomed by International NGOs," July 20, 2005.

⁴⁵⁵ Nor should one consider Kenya's passage of national legislation implementing the ICC treaty as evidence of its intent to comply with the Rome Statute. Although it began the process of adopting an International Crimes Act in 2005, the Act was only passed in January 2009. Therefore, it was not passed until after the 2007 post-election violence and Prosecutor Moreno-Ocampo's threats to launch an ICC investigation into that violence. Antonia Okuta, "National Legislation For Prosecution Of International Crimes In Kenya," *Journal of International Criminal Justice* 7 (2009): 1063. That timing, and Kenya's other conduct in relation to the post-election violence and the ICC investigation tend to discredit any claim that the Act was passed because Kenya is fully committed to complying with treaty terms. Kenya's International Crimes Act is available at http://www.kenyalaw.org/kenyalaw/klr_app?frames.php.

militarily was important to the national interests of the United States.⁴⁵⁶ Second, as discussed in more detail below, the facts of the 2007 post-election violence and Kenya's interactions with the ICC regarding its investigation of that violence are not compatible with those of a country committed to good human rights practices and an intention to end impunity for those who commit serious international crimes. Finally, also as discussed below, Kenya's decision to invite Sudan's President Bashir to Kenya to celebrate its new constitution in August 2010 is further evidence of Kenya's non-compliance with the ICC's terms. Indeed, Kenya's actions are quite clearly at odds with the statement Kenya's Assistant Minister for Foreign Affairs, Moses Wetangula, made about Kenya's intended compliance shortly after it refused to sign an immunity agreement with the United States. He said: "The Kenyan government has no intention of exempting anybody or any country under any circumstances [from the operation of the ICC's processes]." ⁴⁵⁷ Yet, it was Mr. Wetangula himself who invited Bashir to visit Kenya, notwithstanding that Bashir was the subject of an ICC arrest warrant.⁴⁵⁸

The 2007 Post-Election Violence and the ICC Investigation

The facts surrounding Kenya's 2007 post-election violence and Kenya's interactions with the ICC as a result of that violence are proof of Kenya's refusal to comply with treaty terms. They also suggest that Kenya's ratification did not signify any sincere intention to commit to positive normative change. As noted above, Kenya has had a history of election-related ethnic violence – a fact of which President Kibaki was well-aware when Kenya ratified the ICC treaty. Yet, Kibaki allegedly rigged election results which voting tallies had suggested were favoring

⁴⁵⁶ Memorandum for the Secretary of State, Presidential Determination No. 2009-14, January 16, 2009, <http://www.whitehouse.gov/news/releases/2009/01/20090116-8.html>.

⁴⁵⁷ Fred Oluoch, "Kenya On Collision Course With U.S. On ICC Treaty," East African, April 25, 2005, available at 2005 WLNR 6529705.

⁴⁵⁸ Koert Lindijer, "Al-Bashir Rains Kenya's Party," Radio Netherlands Worldwide, Sept. 6, 2010, <http://www.rnw.nl/international-justice/article/al-Bashir-rains-kenya's-party>.

Kibaki's opponent, Raila Odinga.⁴⁵⁹ Even if Kibaki did not himself rig the results, his actions after Odinga's party alleged Kibaki had committed electoral fraud did not help to ease an already tense situation. Indeed, within only one hour after the Chair of the Electoral Commission of Kenya declared Kibaki the winner of the presidential elections – and even though Odinga's party was still alleging fraud – Kibaki quickly had himself sworn into office before the people had any chance to voice their anger or concern.⁴⁶⁰ Immediately after the results were announced to the public, violence erupted. Although reports suggest that some violence was spontaneous and some was orchestrated by Odinga supporters against the ethnic groups that supported Kibaki, the facts also show that Kibaki's own police forces actually contributed to the violence which left more than one thousand people dead and hundreds of thousands displaced.⁴⁶¹

As the extent of the violence became known, the international community intervened, and established a mediation process led by former Secretary-General of the United Nations, Kofi Annan. The main outcome of that process was the formation of a grand coalition Government, with Kibaki as President and Odinga as Prime Minister. In addition, a Commission of Inquiry was charged with investigating the post-election violence and making recommendations. That Commission of Inquiry was chaired by Justice Philip Waki, of the Kenyan Court of Appeal. On October 15, 2008, the Commission issued its report (the "Waki Report") which concluded that some individuals may have committed crimes against humanity in the context of the post-election violence. The Waki Report recommended establishing a Special Tribunal in Kenya, but with some judges from the international community, to investigate, prosecute, and adjudicate the

⁴⁵⁹ Human Rights Watch, *Ballots to Bullets*, "Organized Political Violence and Kenya's Crisis of Governance," March 2008, 21-23 (noting that international observer missions issued statements condemning the tallying results and casting doubt on the conclusion that Kibaki was the rightful winner of the election).

⁴⁶⁰ *Ibid.* at 22.

⁴⁶¹ United Nations High Commissioner for Human Rights, Report from OHCHR Fact-finding Mission to Kenya, 6-18 February 2008, (2008): 8-12; Human Rights Watch, *Ballots to Bullets*, "Organized Political Violence and Kenya's Crisis of Governance," March 2008, 2.

identified alleged crimes. In the event the Special Tribunal failed to carry out its functions, the Commission recommended delivering to the ICC the names of the individuals most responsible for instigating the violence so that they could be prosecuted internationally. To insure that its wishes might be followed, the Commission provided Kofi Annan with a list of names that he could give to the ICC in the event the Special Tribunal processes did not proceed.⁴⁶²

As is evident from the fact that the ICC is now proceeding to prosecute six high-level Kenyans for crimes against humanity based on their roles in instigating the 2007 post-election violence, Kenya did not comply with the Commission's recommendations – or its obligations under the Rome Statute to put an end to impunity for mass atrocities by prosecuting such crimes domestically. Indeed, far from showing a government committed to ending impunity, this record shows a government intent on stonewalling any attempt to hold its representatives accountable, whether domestically or internationally. First, it was only hours before the Waki Commission's deadline was set to expire – and names forwarded to the ICC – that Kibaki and Odinga finally signed a bill starting the legislative process towards establishing a Special Tribunal to try post-election violence suspects.⁴⁶³ Second, when the bill to establish a Special Tribunal came to a vote, Parliament rejected it.⁴⁶⁴ And, even though it is true that Kibaki and Odinga presented and lobbied for the bill, reports indicate that Kibaki and Odinga were actually less than supportive of it.⁴⁶⁵ In fact, one Member of Parliament recently argued to the press that if Kibaki and Odinga

⁴⁶² Antonia Okuta, "National Legislation For Prosecution Of International Crimes In Kenya," *Journal of International Criminal Justice* 7 (2009): 1063-65; Jeffrey Gettleman, "Kenya's Bill for Bloodshed Nears Payment," *The New York Times*, July 16, 2009.

⁴⁶³ David Mugonyi, "Secret list: Now Kibaki and Raila sign pact," *Daily Nation*, Dec. 17, 2008, <http://www.nation.co.ke/News/-/1056/503642/-/view/printVersion/-/14c3qeg/-/index.html>.

⁴⁶⁴ One lawyer from the Kenyan National Commission on Human Rights offered his opinion that Parliament would only vote to establish a Special Tribunal if they could be sure that it would be totally ineffectual since many of the murderers responsible for the post-election violence are in government. Jeffrey Gettleman, "Kenya's Bill for Bloodshed Nears Payment," *The New York Times*, July 16, 2009.

⁴⁶⁵ Bernard Namunane and Macharia Gaitho, "Puzzling alliances in fight against Tribunal Bill," *Daily Nation*, Feb. 12, 2009, <http://www.nation.co.ke/News/politics/-/1064/529716/-/view/printVersion/-/v2xbgg/-/index.html>.

had really wanted a Special Tribunal established, they could have used their leadership roles and more assertively pressed for it.⁴⁶⁶ Third, Kenya has done little otherwise to hold accountable those responsible for instigating the post-election violence and causing thousands of deaths and displacements. Indeed, in its March 31, 2010 decision authorizing the ICC Prosecutor's request to proceed with his investigation of the post-election violence, the ICC court noted that the only domestic investigations and prosecutions were of relatively minor offenses and against persons who did not bear the greatest responsibility.⁴⁶⁷

Kenya's interactions with the ICC and its investigation similarly show a government that is not committed to ending impunity or complying with its treaty obligations. Although Kibaki and Odinga both pledged to cooperate with the ICC's investigation, there is evidence that Kenya has been frustrating some of the Prosecutor's efforts to gather evidence. For example, the government is arguing that some documents can be withheld on grounds of national security, and Kenya's police commissioners and officers have refused to give statements.⁴⁶⁸ Kenya's reaction to the Prosecutor's naming of his six suspects only provides more evidence of a government committed to obfuscating the processes of justice. Immediately thereafter, Kenya's parliament voted overwhelmingly to withdraw from the ICC,⁴⁶⁹ notwithstanding that polls show that most ordinary Kenyans support the ICC and hope that it can bring perpetrators of the violence to justice.⁴⁷⁰ Of course, the legislators now argue that it would be better to establish a local tribunal to try Kenyans for the crimes committed during the post-election violence. And, they have now presented that plea to halt ICC processes so that Kenya may try 2007 post-election violence

⁴⁶⁶ Sarah Wambui, "Anger over MPs vote against ICC," Capital News, Dec. 25, 2010.

⁴⁶⁷ ICC Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," (March 31, 2010), ¶¶ 183-86, available at <http://www.icc-cip.int/iccdocs/doc854287.pdf>.

⁴⁶⁸ Michael Onyiego, "Legal Challenges Threaten to Undermine ICC Investigation in Kenya," VOA News.com, Oct. 4, 2010.

⁴⁶⁹ Sarah Wambui, "Anger over MPs vote against ICC," Capital News, Dec. 25, 2010.

⁴⁷⁰ Jeffrey Gettleman, "Kenya's Bill for Bloodshed Nears Payment," The New York Times, July 16, 2009.

suspects domestically to the African Union, the ICC court, and the United Nations.⁴⁷¹ The United Nations Security Council denied that bid for postponement in March 2011, prompting Kenya to now appeal to the ICC court to halt the cases on the grounds that it will commence domestic proceedings.⁴⁷² But, as one Member of Parliament has noted, had the government really wanted a local tribunal, it could have voted for that option a year before.⁴⁷³

Kenya Invites Sudan's President Bashir to Celebrate its New Constitution

Kenya's decision to invite President Omar al-Bashir of Sudan to attend Kenya's August 2010 celebration of the passage of its new constitution is further evidence that Kenya did not support the ICC's normative goals or intend to comply with them when it joined the court in 2005. On the one hand, Kenya finally implemented a new constitution providing for a more decentralized political system which will minimize presidential power and independence of the judiciary – facts which suggest that Kenya may be embracing democracy and ideas about holding leaders accountable to respect the rule of law.⁴⁷⁴ On the other hand, however, Kenya extended an invitation to the celebration of its new constitution to a leader who is the subject of an ICC arrest warrant charging him with war crimes, crimes against humanity, and genocide based on violence in Sudan's Darfur region which has left some 300,000 people dead.⁴⁷⁵ Indeed, not only did Kenya extend that invitation to President Bashir, it also hosted him in the country and allowed him to return to Sudan – a fact which Human Rights Watch has suggested will

⁴⁷¹ Gekara, "Kenyan security chiefs' bid to suspend Ocampo probe fails;" Kumba, "Kenya's bid to defer ICC cases faces more hurdles;" Mathenge, "Rough road ahead as Kenya plans to lobby UN's Big Five,"

⁴⁷² Dorin Apollos, "UNSC declines Kenyan bid on ICC deferral," KBC News, Mar. 19, 2011; Michael Onyiego, "Kenya Seeks Another Way to Stall Hague Proceedings," VOAnews.com, Mar. 21, 2011; Benjamin Muindi, "Minister says Kenya a 'laughing stock' over ICC deferral," Daily Nation, Mar. 25, 2011.

⁴⁷³ Sarah Wambui, "Anger over MPs vote against ICC," Capital News, Dec. 25, 2010.

⁴⁷⁴ A copy of Kenya's 2010 constitution can be found at <http://www.nation.co.ke/blob/view/-/913208/data/157983/-/18do0kz/-/published+draft.pdf>.

⁴⁷⁵ For more information on the ICC's case against Bashir, see <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB>.

“tarnish [Kenya’s] celebration of its long-awaited constitution.”⁴⁷⁶ Kenya’s own National Human Rights and Equality Commission stated that the “government’s lack of action is a statement of impunity and sends a worrying message on the implementation of the new constitution.”⁴⁷⁷ As a member of the ICC, Kenya was required to arrest Bashir and transfer him to The Hague. It did not do so even in the face of pleas to cooperate by the ICC and the EU.⁴⁷⁸

Of course, Kenya has advanced various reasons for its failure to comply with its obligations under the ICC treaty, but none changes the fact of its noncompliance. For example, Kenyan representatives have stressed that peace in Southern Sudan and Darfur may suffer if African nations are seen to be putting too much pressure on President Bashir.⁴⁷⁹ Kenya has further noted that by refusing to arrest Bashir, it is following the recommendation of the African Union which decided not to cooperate with the United Nations in arresting Bashir and instead asked for a Security Council postponement of the case.⁴⁸⁰ Prime Minister Odinga advanced a different reason for failing to take a role in ensuring that Kenya complied with its obligations under the Rome Statute: he claimed not to have been aware that Bashir was invited to the celebration of the new constitution. Members of Odinga’s party state that Bashir was invited to the celebration by Foreign Minister Wetangula, a member of Kibaki’s party. Indeed, Odinga is reported as saying that he has no problem with Sudan as a neighbor, but that he knows that Kenya looks “very bad in the eyes of the international community if [it] invited somebody

⁴⁷⁶ “Kenya, African Union defend Bashir visit,” CNN World, Aug. 31, 2010.

⁴⁷⁷ Koert Lindijer, “Al-Bashir Rains Kenya’s Party,” Radio Netherlands Worldwide, Sept. 6, 2010, <http://www.rnw.nl/international-justice/article/al-Bashir-rains-kenya's-party>.

⁴⁷⁸ “Court worry at Omar al-Bashir’s Kenya trip,” BBC News Africa, Aug. 27, 2010.

⁴⁷⁹ Koert Lindijer, “Al-Bashir Rains Kenya’s Party.”

⁴⁸⁰ Ibid.; Samantha Spooner and Charles Onyango-Obbo, “Kenya: Why Country Chose to Ignore Warrants by ICC and Sup With the Devil,” East African, Sept. 6, 2010. A copy of the African Union’s Decision in which it stated that African Union member states would not cooperate with any obligation under Article 98 of the Rome Statute to arrest President Bashir is available at [http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20\(XIII\)%20_E.PDF](http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20(XIII)%20_E.PDF).

indicted to spoil the party for us.”” Again, however, actions speak louder than words. Odinga’s statement suggests he knows Kenya has an obligation to comply with the Rome Statute’s terms and arrest Bashir, but there is no evidence to suggest he took any actions to ensure that compliance.

In sum, even assuming that Kenya had some good reasons for believing that Bashir should not be arrested or prosecuted by the ICC, its refusal to arrest him evidences a lack of normative commitment to the ICC’s goals and a refusal to comply with ICC treaty terms. Moreover, this is not a situation where Bashir simply appeared in Kenya unannounced. By inviting President Bashir to visit, Kenya purposely went out of its way to demonstrate its disdain for the ICC’s stated goal of ensuring that perpetrators of mass atrocities are brought to justice – a goal it committed to advancing by joining the court.

Kenya and the ICC: Assessing the Explanatory Power of the Credible Threat Theory

Kenya’s decision to commit to the ICC treaty in 2005 is not consistent with the credible threat theory since at that time, Kenya’s human rights practices were still poor and its domestic law enforcement institutions were still weak. By its participation in the negotiations leading to the adoption of the Rome Statute, and by the comments its representatives made during those negotiations, there can be no doubt that Kenya knew of the relative strength of the ICC’s enforcement mechanisms. Yet, and in contrast to its behavior in connection with other international human rights treaties, in 2005, Kenya committed to the ICC treaty notwithstanding that the facts at the time suggested compliance with treaty terms may be difficult.

So, why did Kenya commit to the ICC treaty in 2005? While we may never have an unequivocal answer to that question, the evidence does indicate that normative pressures played

a significant role in Kenya's ratification decision. By the time it ratified the Rome Statute in 2005, some 26 African states had already committed to the court. Moreover, after Kibaki became President, Kenya was the subject of considerable domestic and international lobbying designed to persuade it to join the ICC. Indeed, that normative pressures may have contributed to Kenya's decision to join the ICC seems likely inasmuch as Kenya has not shown itself to be a state that joins international human rights treaties with which it may not be able to comply unless those treaties have the very weakest enforcement mechanisms. And, of course, the facts post-ratification show that Kenya was not really committed to complying with the court's normative goals. It is true that Kibaki resisted signing a bilateral immunity agreement with the United States. But, that fact suggesting compliance is easily outweighed by the other evidence – such as the 2007 post-election violence, the invitation to Bashir, and the interactions with the ICC – which demonstrates Kenya's noncompliance with ICC treaty terms.

On the other hand, although Kenya's decision to commit to the ICC in 2005 is not consistent with the credible threat theory, Kenya's behavior both before and after commitment is consistent with the theory – and consistent with the idea that states with bad practices will avoid costly commitments with which they cannot, or will not, comply. Most particularly, the facts show that while Kenya was an early signer of the ICC treaty (a costless decision), for some six years thereafter, it refused to ratify the treaty and commit to its relatively strong enforcement mechanisms. And, of course, during all this time, Kenya had the poor human rights practices and weak domestic law enforcement institutions that would make commitment to the court particularly costly. That costs likely explains Kenya's decision to refrain from joining the ICC during this time period is supported by other evidence as well. First, Kenya's ratification behavior in connection with other international human rights treaties shows that it avoids those

with stronger enforcement mechanisms. Furthermore, this was not a situation where ratification would have been domestically difficult. Moi ran the country as an autocracy, and the previous Kenyan constitution allowed the president and his cabinet to make treaty ratification decisions.

In addition, after ratifying the ICC treaty in 2005, Kenya has also acted consistently with the credible threat theory in that it has shown that it is well-aware of the strength of the ICC's enforcement mechanisms and seeks to now avoid its costly commitment. Not only did Kenya fail to comply with ICC treaty terms by virtue of its leaders' roles in instigating and participating in the 2007 post-election violence, but in the aftermath of that violence, Kenya has allowed impunity to reign. It has not prosecuted those most responsible for the violence; it refused to set up a Special Tribunal to try perpetrators; it is not fully cooperating with the ICC's investigation; and at least some in Kenya's government are now seeking to withdraw from the ICC and/or seeking to halt its processes. In short, because Kenya is either unwilling or unable to comply with the terms of the Rome Statute, and because it is only too aware of the ICC's enforcement mechanisms, its behavior is consistent with that predicted by the credible threat theory: Kenya is seeking to avoid its costly commitment to the court.

In any event, even if Kenya's decision to ratify the ICC in 2005 is not consistent with the credible threat theory, it is also not consistent with the credible commitment theory. First, as noted above, Kenya did not ratify the treaty during President Moi's reign. Yet, at that time, the country had a history of civil violence, poor human rights practices, and weak institutions of domestic accountability – meaning that, according to the credible commitment theory, Moi could have benefited from ratifying the ICC treaty so as to tie his hands and demonstrate to his domestic audience his intention to end Kenya's cycle of violence and impunity. Again, however, there is no reason to believe that Moi would want to subject himself to an international institution

that would hold him accountable when he did not want to commit to any domestic accountability mechanisms.

Nor is the fact that Kenya committed to the ICC during Kibaki's reign consistent with the credible commitment theory. To the extent that Kenya was a *democracy* in 2005, then the credible commitment theory would predict that a state like Kenya with a history of civil violence and poor human rights practices would avoid ICC commitment. In that case, theory predicts the sovereignty costs of commitment would not be outweighed by any benefit from signaling the government's credible commitment to end any cycle of violence or impunity because the stronger domestic institutions of accountability could provide that signal instead to the domestic audience. Yet, Kibaki committed to the ICC at a time after Kenya had theoretically become a democracy and had allowed for some controls on his actions – for example, by way of civil society institutions like the Kenya National Commission of Human Rights.

Nor is Kenya's decision to commit to the ICC in 2005 consistent with the credible commitment theory even if in 2005 one characterizes Kenya as a non-democracy. It is true that if Kenya was a non-democracy in 2005, it acted as predicted by the credible commitment theory since it ratified the Rome Statute. At the same time, however, the evidence post-ratification overwhelmingly shows that the Kenyan government did not join the ICC so as to credibly commit to end a cycle of violence and impunity. Rather, Kenya's post-ratification record is littered with evidence that the country was not committed to ending violence or impunity. Again, as to the cycle of violence, both of the main government parties are implicated in the 2007 post-election clashes that resulted in over 1000 deaths and hundreds of thousands of displacements. The post-ratification evidence regarding ending impunity is equally bad. First, the country is the subject of an ICC investigation precisely because it has failed to hold those

accountable for the acts committed during the post-election violence. Second, it was only in August 2010 that the government finally put into force a new constitution that would limit presidential powers and provide for greater judicial independence. And, even that supposed step forward in the fight towards ending impunity was marred by the fact that the government essentially promoted impunity by asking President Bashir to visit the celebration of the new constitution. Finally, even if Kenya ultimately does not withdraw from the ICC,⁴⁸¹ the legislature's vote for withdrawal is further proof that Kenya is not committed to ending the cycle of impunity.⁴⁸² Indeed, the vote itself provides support for the credible threat theory since it shows that Kenya recognizes the costliness of committing to the ICC – costs it wants to avoid, rather than commit to credibly.

Along similar lines, it bears noting that Kenya's decision to ratify the ICC treaty is also not consistent with the hand-tying theory advanced by Andrew Moravcsik to explain the ratification behavior of states that are transitioning democracies. It is true that Kenya may have been a transitioning democracy during 2005, but the same evidence discussed above also shows that Kenya was not committed to tying its hands to lock-in domestic democratic reforms.⁴⁸³ The evidence shows instead that Kenya committed to the ICC, but did not at the same time commit to the normative changes that would have allowed it to comply with treaty terms. Instead of locking in democratic reforms, after committing to the ICC, Kibaki failed to limit his own presidential power as promised; allegedly rigged his own election; and failed to prevent his

⁴⁸¹ As commentators have noted, even if Kenya did withdraw from the ICC, by treaty terms, its withdrawal would not have the effect of halting the present ICC investigation. Kevin Jon Heller, "Kenya Moves Closer to Withdrawing from the ICC," *Opinio Juris*, Dec. 12, 2010, <http://opiniojuris.org/2010/12/23/kenya-moves-closer-to-withdrawing-from-the-icc/> (referencing Article 127 of the Rome Statute).

⁴⁸² Kevin Jon Heller, "Kenya Moves Closer to Withdrawing from the ICC," *Opinio Juris*, Dec. 12, 2010, <http://opiniojuris.org/2010/12/23/kenya-moves-closer-to-withdrawing-from-the-icc/>; "PM Says Kenya Will Not Withdraw From ICC," *VOANews.com*, Dec. 23, 2010.; Alphonse Shiundu, "MPs' vote sets stage for Kenya to cut ties with ICC," *Daily Nation*, Dec. 24, 2010.

⁴⁸³ Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54 (2000): 225-30.

security forces from committing criminal acts during the violence that followed his disputed presidential win.

In conclusion, although Kenya's decision to refrain from committing to the ICC as long as it did is consistent with the credible threat theory, Kenya's decision to commit to the ICC in 2005 when it still had poor human rights practices and poor domestic law enforcement institutions is not. Although Kenya was ostensibly in the process of reforming its domestic practices and institutions under Kibaki's reign, at the time of ratification, and as the country's later actions show, there is little doubt that the country was not truly ready to commit to complying with the terms of the ICC treaty. And, Kenya's decision to ratify the ICC treaty without making the concomitant commitment to honor the treaty's normative goals has caused it to incur significant sovereignty costs: it is now the subject of an ICC investigation to punish its noncompliant behavior.

But, while that investigation may be bad news for Kenya, the very fact of the investigation has served to show the strength of the ICC's enforcement mechanisms. The ICC prosecutor gave Kenya an opportunity to investigate and prosecute perpetrators of the 2007 post-election violence domestically, but when it did not, the ICC prosecutor acted. In fact, for the very first time the prosecutor used his *proprio motu* powers to commence a case. And, although there is much evidence of Kenya's noncompliance, the evidence also shows that the cases against the six named suspects will go forward. They will go forward even if Kenya withdraws from the ICC.

The situation with Kenya also serves to show the potential for treaties with strong enforcement mechanisms to improve human rights practices and end impunity. Even if Kenya does not commence any of its own domestic investigations, the ICC's strong enforcement

mechanisms have ensured that at least some of the worst perpetrators will be held accountable. In addition, the fact of the ICC's investigation into Kenya's 2007 post-election violence should provide a warning to other states that their failure to comply with treaty terms will not go unpunished. Even if states may have committed to the ICC treaty despite their inability to comply and trusting that the enforcement mechanisms would never be invoked, they now have evidence to the contrary. If they want to avoid a fate similar to Kenya's – and one might expect that if they are at all logical they would – they will improve their human rights practices.

CHAPTER TEN CONCLUSION

Credible Threat and the Case for Stronger Enforcement Mechanisms

What explains the puzzle of state commitment to the ICC? Why would states commit to an international human rights treaty with relatively strong enforcement mechanisms even though states typically guard their sovereignty? Can we expect that the more than 100 states that have ratified the ICC treaty will abide by treaty terms and protect against human rights abuses and/or domestically prosecute any of their citizens who commit mass atrocities? Can we further expect that these more than 100 states are committed to the goal of ending impunity for perpetrators of mass atrocities? On the other hand, why did some 90 states fail to ratify the ICC treaty or do so more slowly than others? Given the ICC treaty's relatively strong enforcement mechanisms, can we expect that states with the worst human rights practices and worst domestic law enforcement institutions are among the states that have not ratified? If the majority of states joining the court are also those that already have the best human rights practices, can the ICC really have a significant impact on improving universal respect for human rights and deterring mass atrocities?

These are the questions that were posed in the introduction and to which I suggest this study has provided some answers. Both the quantitative and case study analyses have shown that states tend to view the ICC's relatively strong enforcement mechanisms as a credible threat and are more likely to commit to the court when their retrospective calculations about compliance costs show that commitment will pose little threat to their sovereignty. The results of the quantitative analyses show that states with good human rights records are more likely to ratify the ICC treaty than are states with poor human rights records. This finding regarding ICC commitment is in stark contrast to other published findings for international human rights treaties

with the weakest enforcement mechanisms.⁴⁸⁴ Indeed, only very recently, Christine Wotipka and Kiyoteru Tsutsui found that states with poor human rights practices were actually more likely to ratify international human rights treaties: but all of the treaties included in their study only require states to file reports regarding their compliance.⁴⁸⁵

The finding regarding state commitment to the ICC is also in stark contrast to the results of the quantitative tests conducted in this study of state commitment to other international human rights treaties. Those results show that states with poor human rights records regularly commit to international human rights treaties with the weakest enforcement mechanisms, but they are wary of committing to the treaty creating the ICC. The implication is that where enforcement mechanisms are stronger, states take their commitment to international human rights treaties seriously and consider the likely costs to their sovereignty by committing to a treaty that can actually punish bad and noncompliant behavior. Thus, it may be that states are committing to treaties with weak enforcement mechanisms in an effort to signal their legitimacy, without any real intention of bettering their human rights practices. At least some of those states may conclude that the costs of commitment are cheap and the consequences of noncompliance are meager or nonexistent. On the whole, states may commit to the ICC for other reasons entirely: because they intend to comply with treaty terms and seek to realize the treaty's goals. After all, according to the terms of the ICC treaty, states can be punished for failing to comply by an independent prosecutor and court that can require the state's citizens appear in The Hague to stand trial for any of the covered crimes.

⁴⁸⁴ For example, see Cole, "Sovereignty Relinquished?," 483-84 (noting the insignificance of the variable measuring the influence of human rights ratings on ratification of the ICCPR and ICPSCR).

⁴⁸⁵ Wotipka and Tsutsui, "Global Human Rights and State Sovereignty," 744-47 (noting that results of event history analyses testing state ratification of 7 international human rights treaties (all of which contained only reporting enforcement mechanisms) showed that rights-violating governments were more likely to ratify those treaties in a given year, all else being equal).

In addition, however, the results of the quantitative analyses also show that states only view enforcement mechanisms as a credible threat where those mechanisms include a formal grant of power to engage in legally-binding decision making accompanied by resources to coerce compliance. The results in Chapter Four show that states did not view any of the enforcement mechanisms in Levels 1 through 4 as a credible threat. In none of those cases was a state's level of human rights practices a significant and positive predictor of ratification, suggesting that states are not overly concerned with the costs of complying with treaty terms where enforcement mechanisms do not include a grant of power to engage in legally-binding decision making. Only in the case of the ICC treaty was a state's level of human rights practices a significant and positive predictor of ratification. And, only that treaty contains an enforcement mechanism which allows for legally-binding decision making. States joining the ICC delegate to an independent prosecutor and court the powers to mount investigations, issue arrest warrants, commence investigations, and punish persons who commit mass atrocities where the state refuses or is unable to do so domestically. Accordingly, the evidence suggests that in the case of ICC commitment, states are concerned about the costs of the compliance and the relative strength of the ICC treaty's enforcement mechanisms and engage in retrospective calculations about their likelihood of compliance prior to commitment.

On the other hand, there is little evidence – either quantitative or qualitative – to support the power of the other rationalist theories, the credible commitment theory, or normative theories to generally explain state decisions to join the ICC. For the most part, states are not committing to the ICC treaty even though they cannot comply with its terms so as to demonstrate any future promise to change their ways and commit to ending violence and impunity in the future. Nor are states as a rule committing to the ICC despite their ability to comply because of normative

pressures. Indeed, the case study of Rwanda well illustrates the explanatory power of the credible threat theory as it relates to states with poor human rights practices, a recent history of domestic conflict, and weak domestic law enforcement institutions. The facts show that President Kagame is well aware of the ICC's relatively strong enforcement mechanisms and also that he is aware that Rwanda's government and its people may not be able to comply with treaty terms. As to the government, Kagame has made clear that he believes the government may need to resort to force and violence in order to ensure that Rwanda does not experience another genocidal episode. And, even though some in the international community have severely criticized Kagame for failing to hold his soldiers sufficiently accountable for acts of violence committed during the genocide and thereafter, he continues to maintain that he – and Rwanda – should be the judge of what justice is proper in Rwanda for acts involving its citizens. Given these facts, the country rationally engaged in retrospective calculations about whether it could comply with the ICC's treaty's terms and avoided committing to a treaty with which it may not be able to comply and which could impose significant costs on its sovereign rights to rule and administer justice as it believes is necessary and warranted given its history.

Furthermore, although the Rwanda case study necessarily involved only one state, there is reason to believe that the credible threat theory can also explain the decision of other states with poor human rights records, a history of domestic violence, and poor domestic law enforcement institutions to refuse to ratify the Rome Statute. Like President Kagame, leaders of other states with similarly complicated and violent histories may be wary of committing to international institutions that can tie their hands and prevent them from responding with force or violence to domestic crises. On the contrary, states with a history of violence may have the kinds of social cleavages that can continue to make civil violence a possibility, and the state may

feel justified in responding with force simply so as to quell that violence and establish some sense of peace and security for the population as a whole. Leaders of states with a history of domestic violence, like Kagame, are likely to be concerned about the credible threat posed by committing to an institution like the ICC with which they may not be able to comply and which they cannot control. Because the costs of committing to such a treaty are high, states that cannot, or do not intend to, comply with treaty terms will more typically avoid commitment.

Naturally, no theory can explain the behavior of all states, and we know that some states with poor human rights practices and weak domestic law enforcement institutions have committed to the ICC. However, because the ICC treaty has relatively strong enforcement mechanisms, and because states typically guard their sovereignty, the evidence shows that states do not typically make ICC commitment decisions without regard for their ability to comply with treaty terms. In fact, the case study of Kenya provides evidence as to what may happen to states that fail to calculate, or disregard calculations about, their costs of compliance when deciding to commit to the ICC. Kenya is now the subject of an ICC investigation, and many in its government now want to withdraw from the ICC and escape the yoke of its strong enforcement mechanisms.

But, even if the evidence does suggest that states typically engage in cost-of-compliance calculations when determining whether or not to commit to the ICC, does this also mean that states committing to the ICC treaty on the whole also intend to comply with treaty terms? Is there evidence that those states embrace and intend to promote international human rights norms – including the Rome Statute’s stated goals of deterring mass atrocities and ending impunity for those that commit them? Although this study cannot provide unequivocal answers to these questions, I suggest that there is some support for a conclusion that in the case of the ICC – and

on the whole – states are committing to the treaty because they intend to abide by treaty terms and seek to end impunity for perpetrators of mass atrocities. First, the fact that more states with better human rights practices join the ICC treaty more readily than do states with bad practices indicates that states are generally committing because their retrospective cost calculations show they can comply with treaty terms and avoid a costly loss of their sovereignty. The case study evidence shows that even states with good human rights practices continue to make efforts to comply with ICC treaty terms even after ratifying the statute. Both Germany and Trinidad and Tobago have enacted domestic legislation enabling them to prosecute mass atrocities domestically. Not only does such legislation serve as a warning to the states' leaders and citizens that human rights abuses will not be tolerated in the future, it also means that those countries have taken steps to insure that perpetrators of mass atrocities that seek safe harbor in their countries will not be allowed to escape justice. Thus, the enactment of the legislation alone serves to further the goal of deterring crime and ending impunity for mass atrocities. And, it is because of the ICC treaty that these countries have taken these additional steps in furtherance of the treaty's goals.

In addition, however, the evidence also suggests that the credible threat to state sovereignty posed by the ICC treaty's relatively strong enforcement mechanisms is generally deterring states with poor human rights practices and weak domestic law enforcement institutions from committing to the court. If this is the case, then, can the ICC really make a difference where it most needs to make a difference? After all, if the states with the worst practices are not joining the court, can the ICC treaty actually make strides in deterring mass atrocities and ensuring that the perpetrators of mass atrocities are brought to justice?

Again, although no unequivocal answer to these questions is possible, this study has also

produced evidence which provides hope that the ICC can make a difference even as to those states with the worst human rights practices. First, there is some evidence suggesting that the ICC's complementarity provision may play a positive role in prompting at least the more democratic states among those with poor human rights practices to commit to the court. According to the results of the quantitative analyses conducted in Chapter Three, a state's level of democracy is a significant and positive predictor of ICC treaty ratification. In addition, Table 6 shows that amongst states with poor human rights practices – and contrary to the predictions of the credible commitment theory – the more democratic states are more likely to join the ICC. Therefore, it may be that even though a state has poor practices, where it is more democratic and already has checks and balances on its domestic power – such as through an independent judiciary – it may still conclude that commitment to the ICC does not impose significant sovereignty costs. In short, the government may assume that it will be punished domestically anyway should it commit human rights abuses, and because the ICC treaty's complementarity provision allows the state to avoid an ICC prosecution if it prosecutes human rights abuses domestically, the government could rationally conclude that commitment would not reduce its power.

Indeed, for states with poor human rights practices that are more democratic such that they have checks and balances on their domestic powers, ICC commitment may in some cases prove beneficial in increasing government power. Even though the state may have judicial or other mechanisms to hold opposition powers accountable should they commit human rights abuses, the ICC can provide an additional fall-back mechanism by which to hold those powers accountable should domestic institutions fail for some reason. On the other hand, as one might expect of non-democracies where leaders enjoy concentrated power – and contrary to the

predictions of the credible commitment theory – non-democracies with poor practices will view ICC commitment as a costly check on their power to rule and punish as they please domestically. What this implies for the future of international organizations is that they are more likely to be successful in getting nations to risk some costly commitments and a potential loss of sovereignty where power within the nation is not concentrated.

As such, at least in some cases, we may see that states with poor human rights records that are more democratic will conclude that commitment to the ICC is not overly costly because the leaders of those states already have domestic constraints on their power. Should such states commit to the ICC, because the treaty creating the court has relatively strong enforcement mechanisms, both the current leaders, any opposition powers, and any future leaders will have to comply with treaty provisions. If the state or its citizens commit mass atrocities, and if the state is unwilling or unable to prosecute those crimes domestically, then the state will have to suffer the costly consequences.

Second, even if states with poor practices are not prompted to join the ICC because they already have domestic checks and balances on government power, the fact remains that a number of states with bad human rights practices and weak domestic law enforcement institutions, like Kenya, have joined the court. They have done so notwithstanding that the credible threat theory predicts that states with bad human rights practices would rationally avoid the potentially costly commitment to the ICC. But, because the ICC treaty's terms include relatively strong enforcement mechanisms, states with poor practices and poor institutions will have to improve their potential for compliance with ICC treaty terms unless they – like Kenya – want to be the subject of the ICC's next investigation.

Furthermore, even though Kenya apparently did not fear the ICC's enforcement

mechanisms enough to improve its practices, the Kenya case now provides ample evidence to other similarly situated states of the perils of failing to comply with the terms of the ICC treaty. Moreover, even though ICC commitment did not cause Kenya to improve its practices, there is still good news as it relates to the power of strong enforcement mechanisms to aid in realizing treaty goals: in this case, the goal of ending impunity for perpetrators of mass atrocities. It appears that at least six suspects who participated in Kenya's 2007 post-election violence will be required to answer for their conduct in The Hague before the ICC court.

Third, the ICC's jurisdictional grant allows it to investigate and prosecute in some circumstances even where the atrocities have not been committed by a citizen of a State Party to the court. Sudan is not a party to the court, but because the Security Council referred that matter to the ICC, President Bashir has become the subject of an ICC arrest warrant. And, although he has not yet been arrested, the fact of the arrest warrant has most certainly curtailed his activities. Only very recently, the Security Council also referred to the ICC "the situation in Libya since 15 February 2011, while recognizing that the country is not party to the Rome Statute that created the Court." In the resolution referring the matter, the Council stated it considered the "widespread and systematic attacks currently taking place in the Libya Arab Jamahiriya against the civilian population may amount to crimes against humanity."⁴⁸⁶ Although the United States simply refrained from vetoing the referral of the Darfur matter to the ICC, in this case, the United States affirmatively voted to refer the Libya matter. Consistent with the United States' tendency to protect its own sovereignty, however, the Obama administration did insist on a special provision in the resolution carving out from the ICC's jurisdiction any alleged crimes committed by non-parties to the ICC stemming from operations in Libya authorized by the

⁴⁸⁶ Press Release, "Security Council imposes sanctions on Libyan authorities in bid to stem violent repression," February 26, 2011.

Security Council. But, the fact of the referral overall is a positive sign that the ICC and its relatively strong enforcement mechanisms will play a role in deterring mass atrocities and ending impunity for those who commit them. As one commentator noted, by virtue of the referral to the ICC, those who instruct or carry out instructions to bomb or otherwise use violence against the civil population in Libya now know that they will potentially be subject to international justice.⁴⁸⁷

Finally, the ICC also has jurisdiction in cases where the citizens of a non-State Party commit atrocities in the territory of a State Party.⁴⁸⁸ Indeed, it is this jurisdictional provision that caused the United States to seek bilateral immunity agreements from States Parties agreeing to refuse to transfer any United States personnel to the custody of the ICC. This same jurisdictional provision is what caused the United States to insist on the provision in the Libyan referral carving out from the ICC's jurisdiction any citizens of non-parties based on alleged actions stemming from actions in Libya authorized by the Security Council. Therefore, states with bad practices – and with leaders and citizens who commit mass atrocities – will generally have reason to fear the ICC even if those states do not become States Parties.

It is true that the ICC is only as effective as the States Parties, and some critics have noted that it has obtained custody over very few of its subjects since it began operating. And, some wonder about the eventual effectiveness of the court without the participation of the United States. While these are both valid concerns, I suggest that the evidence still shows that the court is functioning -- albeit slowly perhaps – and that it is altering state behavior. In its relatively short life, the court has already commenced five cases and issued a number of arrest warrants. Although President Bashir has not appeared in The Hague, other Darfur suspects voluntarily

⁴⁸⁷ Edith M. Lederer, "US supports war crimes tribunal for first time," Associated Press, March 2, 2011.

⁴⁸⁸ Rome Statute, Art. 12 (2) (a).

surrendered.⁴⁸⁹ And, again, although Bashir may be able to travel freely in parts of Africa, he is unlikely to risk venturing to Europe. Indeed, the fact that the ICC has done as much as it has in the relatively short period in which it has been functioning, tends to show that it can be effective – even if the United States is not a member. In any event, even though there is no indication that the United States will become a State Party any time soon, the United States has lent some support to the court, and there is promise that it will continue to cooperate in some respects. By abstaining from the March 2005 Security Council vote, the United States made the referral of the Sudan case to the ICC possible.⁴⁹⁰ It has also condemned Kenya for failing to hold those who instigated the 2007 post-election violence accountable, and has refused to back Kenya’s request to intervene to stop the ICC processes from moving forward.⁴⁹¹ As noted above, the United States also affirmatively voted to refer the Libya matter to the ICC.⁴⁹²

In sum, the evidence does suggest that the ICC treaty’s relatively strong enforcement mechanisms can make a difference not only in screening states at the ratification stage, but also in constraining state behavior – and thereby preventing mass atrocities and/or ending impunity for those who do commit mass atrocities. Of course, it is hard to measure the absence of an event, meaning that we may never know for certain what mass atrocities have been deterred because of the creation of the ICC. And, from the Kenya case study, we do know that even states that commit to the court may thereafter commit crimes that come within the ICC’s jurisdiction. Furthermore, the existence of the ICC apparently did not deter Libya from committing crimes against humanity. But, even though the ICC did not deter those events, this

⁴⁸⁹ ICC Press Release, June 16, 2010.

⁴⁹⁰ Lee Feinstein and Tod Lindberg, Means To An End: U.S. Interest In The International Criminal Court,” 1-2.

⁴⁹¹ Oliver Mathenge and Jacob Ngetich, “Kenya: Rough Road Ahead As Nation Plans to Lobby UN Security Council,” Daily Nation, Feb. 5, 2011; Michael Onyiego, “Kenya Seeks Another Way to Stall Hague Proceedings,” VOAnews.com, Mar. 21, 2011.

⁴⁹² Lederer, “US supports war crimes tribunal for first time,” Associated Press, March 2, 2011.

does not mean that the ICC and its relatively strong enforcement mechanisms are not catalysts for positive change. Again, it appears that one way or another, some of the instigators of the 2007 post-election violence in Kenya will be brought to justice. In addition, the very existence of the ICC has made it much easier than it would otherwise have been for the Security Council to send a strong message to Libya. Without the ICC, the Security Council would have had to threaten to create an ad hoc tribunal like the ICTR or the ICTY. Creating those ad hoc tribunals, however, is not a simple matter which means that Libya would not have had to take seriously any threat to create a new tribunal. While we may never know precisely what violent acts are not committed in Libya because of the Security Council's referral of the matter, at least in this case, Libya knows that the threat of investigation and prosecution is real since the ICC exists and is functioning.

In addition, other evidence as well shows that the ICC and its relatively strong enforcement mechanisms are producing positive change in advancing international human rights norms and the goals of ending impunity for mass atrocities. The evidence does indicate that states have altered their behavior in an effort to comply with the ICC treaty's relatively strong enforcement mechanisms. For example, the case studies show that some states have implemented domestic legislation criminalizing the conduct covered by the Rome Statute. Future research projects could seek out other evidence of compliance by looking more generally at how and whether states have implemented domestic legislation, whether states are otherwise improving their domestic law enforcement institutions, or whether they are conducting more trials of mass atrocities or human rights abuses.

In conclusion, I suggest that the fact that states appear to be focused on compliance costs and the credible threat associated with the ICC's relatively strong enforcement mechanisms is a

positive sign. After all, the point of having states commit to international human rights treaties is to actually encourage those states to promote better human rights practices. But, the ICC treaty can only deal with a small portion of human rights abuses: those that amount to mass atrocities and that are committed by the highest-level offenders. If we hope to improve states' domestic human rights practices using international human rights treaties, we should structure those treaties with "hard law" enforcement provisions that are clear, precise, binding, and backed by resources to coerce compliance and punish noncompliance. Otherwise, without the threat of punishment via strong enforcement mechanisms, states may commit as window dressing only and without an actual intention to further the goals of the treaty or abide by its terms. And, historically, states have done just that according to the studies which have found that states frequently join international human rights treaties, but thereafter continue to abuse human rights.

Some may argue that ramping up the enforcement mechanisms could create a situation where only those states with good human rights practices will actually commit to human rights treaties. I contend, however, that this potential issue is not a reason to proceed with a regime that is essentially toothless and which encourages states to commit to treaties with which they have no intention of complying. As noted above, some states with bad practices are joining the ICC even though it has serious enforcement mechanisms to punish bad and noncompliant behavior. We should expect that for a variety of reasons, states with bad practices would join other international human rights treaties even if those treaties have stronger enforcement mechanisms that can hold states accountable to complying with treaty terms. At least if treaties are designed with "hard law," legally binding enforcement mechanisms, states that do commit to the treaty will also be required to comply.

Second, designing international human rights treaties with strong enforcement

mechanisms still makes sense even if the majority of states that will join such treaties are those with good practices. Strong enforcement mechanisms can incentivize states with good practices to make their practices even better. First, as noted above, because the ICC relies on a system of complementarity, even states with good practices will want to ensure that should they experience a mass atrocity, they have the domestic wherewithal to handle the matter. In addition, in the case of the ICC, states with generally good human rights practices may still have reason to fear the ICC because it covers war crimes. In fact, one main reason the United States – a state with good human rights practices overall – has apparently refused to commit to the ICC is because of the fear that its citizens could be accused of committing war crimes during international conflicts. States that have committed to the ICC, or are contemplating committing to the ICC, may have similar fears. As a result, those states may change their military codes or military training practices so that their military are forced to comply with the treaty's terms.

Of course, even with the credible threat of a strong enforcement mechanism, states simply may not have the ability to improve their human rights practices and/or domestic law enforcement institutions without help from the outside. In some cases, NGOs might be able to provide that support. The CICC, for example, provides some resources and advice to states still needing to implement into their domestic legislation all of the crimes covered the Rome Statute (so that such crimes theoretically can be prosecuted domestically).⁴⁹³ William Burke-White argues that the ICC should have the power and ability to engage in a policy of “proactive complementarity,” whereby the court can help states with the training and resources to actually prosecute mass atrocities domestically.⁴⁹⁴ States and other policy makers should consider assisting further in these and other ways so that states currently without the ability to comply with the Rome Statute

⁴⁹³See <http://www.coalitionfortheicc.org/?mod=romeimplementation>.

⁴⁹⁴ William W. Burke-White, “Proactive Complementarity: The International Criminal Court And National Courts In The Rome System Of International Justice,” *Harvard International Law Journal* 49 (2008).

are able to at least able to take steps towards compliance. States may more readily commit to human rights treaties with strong enforcement mechanisms if they know they will receive assistance in their efforts to comply.

This study provides evidence that states do view strong enforcement mechanisms in international human rights treaties as a credible threat, causing them to care about their ability to comply with those treaties when making commitment decisions and thereafter. For all of the reasons discussed above, there is reason to believe that structuring international human rights treaties with stronger “hard law” enforcement mechanisms will produce greater international cooperation precisely because states will be more likely to comply with, rather than ignore, the international agreements they make. This study has looked at the role treaty terms can play in states’ *ex ante* beliefs about the institution and the role that the existence of apparently stronger enforcement mechanisms can play in screening states at the ratification stage, and constraining their behavior both before and after ratification so that the state can comply with treaty terms. And, among other reasons, it makes sense that at this early stage of the ICC’s life, treaty terms will guide state behavior. Although, as discussed above, I view the prospect for ICC effectiveness as promising, time and future research will provide more guidance as to whether the ICC’s enforcement mechanisms will be as strong in practice as they are on paper.

Future research should look at whether and how the ICC’s activities and behavior relative to carrying out its duties to independently prosecute mass atrocities influences state ratification, commitment, and/or compliance behavior. As information about the institution’s actual activities and functioning accumulates, that actual functioning might alter states’ posterior beliefs about whether ICC commitment is or is not costly. If the ICC proves over time to be ineffective at holding suspects accountable, then as in the case of other international human rights treaties,

states with even bad practices may join because they will see that commitment – notwithstanding treaty terms that appear to have legally-binding enforcement mechanisms – is not costly to state sovereignty. On the other hand – and as I would expect given the preliminary evidence which is somewhat positive about the ICC’s effectiveness and intention to enforce treaty terms – if states see that the ICC is functioning and is able to obtain and prosecute suspects, states should have even more reason to view the ICC’s enforcement mechanisms as a credible threat and behave accordingly. In short, if future research shows that the ICC’s enforcement mechanisms are as strong in practice as they are on paper, there is even more hope that states will alter their behavior so as to comply with those enforcement mechanisms. If states do alter their behavior accordingly, the ICC may actually realize its goals of ending impunity for those who commit the most heinous crimes of genocide, crimes against humanity, and war crimes.

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Appendix A

States Parties to the ICC Treaty and Ratification Dates (as of December 31, 2008)

State	Date	State	Date	State	Date
Afghanistan	2/10/2003	Fiji	11/29/1999	Nauru	11/12/2001
Albania	1/31/2003	Finland	12/29/2000	Netherlands	7/17/2001
Andorra	4/30/2001	France	6/9/2000	New Zealand	9/7/2000
Antigua and Barbuda	6/18/2001	Gabon	9/20/2000	Niger	4/11/2002
Argentina	2/8/2001	Gambia	6/28/2002	Nigeria	9/27/2001
Australia	7/1/2002	Georgia	9/5/2003	Norway	2/16/2000
Austria	12/28/2000	Germany	12/11/2000	Panama	3/21/2002
Barbados	12/10/2002	Ghana	12/20/1999	Paraguay	5/14/2001
Belgium	6/28/2000	Greece	5/15/2002	Peru	11/10/2001
Belize	4/5/2000	Guinea	7/14/2003	Poland	11/12/2001
Benin	1/22/2002	Guyana	9/24/2004	Portugal	2/5/2002
Bolivia	6/27/2002	Honduras	7/1/2002	South Korea	11/13/2002
Bosnia-Herzegovina	4/11/2002	Hungary	11/30/2001	Romania	4/11/2002
Botswana	9/8/2000	Iceland	5/25/2000	Samoa	9/16/2002
Brazil	6/20/2002	Ireland	4/11/2002	San Marino	5/13/1999
Bulgaria	4/11/2002	Italy	7/26/1999	Senegal	2/2/1999
Burkina Faso	4/16/2004	Japan	7/17/2007	Serbia	9/6/2001
Burundi	9/21/2004	Jordan	4/11/2002	Sierra Leone	9/15/2001
Cambodia	4/11/2002	Kenya	3/15/2005	Slovakia	4/11/2002
Canada	7/7/2000	Latvia	6/28/2002	Slovenia	12/31/2001
Central African Republic	10/3/2001	Lesotho	9/6/2000	South Africa	11/27/2000
Chad	11/1/2006	Liberia	9/22/2004	Spain	10/24/2000
Colombia	8/5/2002	Liechtenstein	10/2/2001	St. Kitts and Nevis	8/22/2006
Comoros	8/18/2006	Lithuania	5/12/2003	St. Vincent	12/3/2002
Congo Brazzaville	5/3/2004	Luxembourg	9/8/2000	Suriname	7/15/2008
Cook Islands	7/18/2008	Macedonia	3/6/2002	Sweden	6/28/2001
Costa Rica	6/7/2001	Madagascar	3/14/2008	Switzerland	11/12/2001
Croatia	5/21/2001	Malawi	9/19/2002	Tajikistan	5/5/2000
Cyprus	3/7/2002	Mali	8/16/2000	Tanzania	8/20/2002
Dem. Rep. Congo	4/11/2002	Malta	11/29/2002	Timor Leste	9/6/2002
Denmark	6/21/2001	Marshall Islands	12/7/2000	Trinidad and Tobago	4/6/1999
Djibouti	11/5/2002	Mauritius	3/5/2002	Uganda	6/14/2002
Dominica	2/12/2001	Mexico	11/28/2005	United Kingdom	10/4/2001
Dominican Republic	5/12/2005	Mongolia	4/11/2002	Uruguay	6/28/2002
Ecuador	2/5/2002	Montenegro	11/23/2006	Venezuela	6/7/2000
Estonia	1/30/2002	Namibia	6/25/2002	Zambia	11/13/2002

Appendix B

States Parties to the 14 Different Treaties, Articles, and/or Protocols (as of 2010).

ICCPR (166 State Parties): Afghanistan, Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, North Korea, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, South Korea, Moldova, Romania, Russia, Rwanda, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Thailand, Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, Tanzania, United States, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.

Article 41 (48 State Parties): Algeria, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, Congo, Croatia, Czech Republic, Denmark, Ecuador, Finland, Gambia, Germany, Ghana, Guyana, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Peru, Philippines, Poland, South Korea, Russia, Senegal, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tunisia, Ukraine, United Kingdom, United States, Zimbabwe.

Optional Protocol (115 State Parties): Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Estonia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Kazakhstan, Kyrgyzstan, Latvia, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritius, Mexico, Mongolia, Montenegro, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, South Korea, Moldova, Romania, Russia, San Marino, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, St. Vincent and the Grenadines, Suriname, Sweden, Tajikistan, Macedonia, Togo, Trinidad and Tobago

(denounced 2000), Turkey, Turkmenistan, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela, Zambia.

ICESCR (160 State Parties): Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, East Timor, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Kuwait, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mongolia, Montenegro, Morocco, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, North Korea, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Congo, Romania, Russia, Rwanda, San Marino, Senegal, Serbia, Seychelles, Sierra Leone, Slovak Republic, Slovenia, Solomon Islands, Somalia, South Korea, Spain, Sri Lanka, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.

CERD (173 State Parties): Afghanistan, Albania, Algeria, Andorra, Antigua, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Dominican Republic, East Timor, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Kuwait, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Congo, Romania, Russia, Rwanda, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Slovak Republic, Slovenia, Solomon Islands, Somalia, South Africa, South Korea, Spain, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela,

Vietnam, Yemen, Zambia, Zimbabwe.

Article 14 (53 State Parties): Algeria, Andorra, Argentina, Australia, Austria, Azerbaijan, Belgium, Bolivia, Brazil, Bulgaria, Chile, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Kazakhstan, Liechtenstein, Luxembourg, Macedonia, Malta, Mexico, Monaco, Montenegro, Morocco, Netherlands, Norway, Peru, Poland, Portugal, Romania, Russia, San Marino, Senegal, Serbia, Slovak Republic, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Ukraine, Uruguay, Venezuela.

CEDAW (185 State Parties): Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, North Korea, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, South Korea, Moldova, Romania, Russia, Rwanda, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Thailand, Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, Tanzania, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Zimbabwe.

Optional Protocol (98 State Parties): Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Belize, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Colombia, Cook Islands, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Equatorial Guinea, Finland, France, Gabon, Georgia, Germany, Greece, Guatemala, Guinea-Bissau, Hungary, Iceland, Ireland, Kazakhstan, Kyrgyzstan, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Maldives, Mali, Mauritius, Mexico, Mongolia, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, South Korea, Moldova, Romania, Russia, Rwanda, San Marino, Senegal, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, St. Kitts and Nevis, Sweden, Switzerland, Thailand, Macedonia, Timor-Leste, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom, Tanzania, Uruguay, Vanuatu, Venezuela.

CAT (147 State Parties): Afghanistan, Albania, Algeria, Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Holy See, Honduras, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, South Korea, Moldova, Romania, Russia, Rwanda, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, St. Vincent and the Grenadines, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Thailand, Macedonia, Timor-Leste, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, Yemen, Zambia.

Article 21 (60 State Parties): Algeria, Andorra, Argentina, Australia, Austria, Belgium, Bolivia, Bulgaria, Cameroon, Canada, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Georgia, Germany, Ghana, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Liechtenstein, Luxembourg, Malta, Monaco, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, South Korea, Russia, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States, Uruguay, Venezuela.

Article 22 (64 State Parties): Algeria, Andorra, Argentina, Australia, Austria, Azerbaijan, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Kazakhstan, Liechtenstein, Luxembourg, Malta, Mexico, Monaco, Montenegro, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, South Korea, Russia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, Ukraine, Uruguay, Venezuela.

Optional Protocol (48 State Parties): Albania, Argentina, Armenia, Azerbaijan, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Cambodia, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Georgia, Germany, Guatemala, Honduras, Kazakhstan, Kyrgyzstan, Lebanon, Liberia, Maldives, Mali, Malta, Mauritius, Mexico, Montenegro, New Zealand, Nicaragua, Nigeria, Paraguay, Peru, Poland, Moldova, Romania, Senegal, Serbia, Slovenia, Spain, Sweden, Macedonia, Ukraine, United Kingdom, Uruguay.

CRC (193 State Parties): Afghanistan, Albania, Algeria, Andorra, Angola, Antigua, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Cook Islands, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, East Timor, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kyrgyzstan, Kuwait, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, North Korea, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Congo, Romania, Russia, Rwanda, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Serbia, Seychelles, Sierra Leone, Singapore, Slovak Republic, Slovenia, Slovenia, Solomon Islands, South Africa, South Korea, Spain, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.

ICC (110 State Parties): Afghanistan, Albania, Andorra, Antigua and Barbuda, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, East Timor, Ecuador, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Kenya, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Mali, Malta, Marshall Islands, Mauritius, Mexico, Mongolia, Montenegro, Namibia, Nauru, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, South Korea, Romania, St. Kitts & Nevis, St. Vincent & the Grenadines, Samoa, San Marino, Senegal, Serbia, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Suriname, Sweden, Switzerland, Tajikistan, Tanzania, Trinidad and Tobago, Uganda, United Kingdom, Uruguay, Venezuela, Zambia.

Appendix C

Countries by World Bank Regions

Sub-Saharan Africa

Angola Benin Botswana Burkina Faso Burundi Cameroon Cape Verde Central African Republic Chad Comoros Democratic Republic of Congo Republic of Congo Ivory Coast Equatorial Guinea Eritrea Ethiopia Gabon Gambia	Ghana Guinea Guinea-Bissau Kenya Lesotho Liberia Madagascar Malawi Mali	Mauritania Mauritius Mozambique Namibia Niger Nigeria Rwanda Sao Tome and Principe Senegal Seychelles Sierra Leone Somalia South Africa Sudan Swaziland Tanzania Togo Uganda Zambia Zimbabwe
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East Asia/Pacific

Brunei Cambodia China Cook Islands East Timor Fiji Hong Kong Indonesia Japan Kiribati Nauru New Caledonia North Korea South Korea Laos Malaysia	Marshall Islands Micronesia Mongolia Myanmar Palau Papua New Guinea Philippines Samoa Singapore Solomon Islands Taiwan Thailand Tuvalu Tonga Vanuatu Vietnam
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Eastern Europe/Central Asia

Albania	Macedonia
Armenia	Moldova
Azerbaijan	Montenegro
Belarus	Poland
Bosnia	Romania
Bulgaria	Russia
Croatia	Serbia
Cyprus	Slovak Republic
Czech Republic	Slovenia
Estonia	Tajikistan
Georgia	Turkey
Hungary	Turkmenistan
Kazakhstan	Ukraine
Kosovo	Uzbekistan
Kyrgyz Republic	
Latvia	
Lithuania	

Latin America/Caribbean

Antigua	Haiti
Argentina	Honduras
Bahamas	Jamaica
Barbados	Mexico
Belize	Nicaragua
Bolivia	Panama
Brazil	Paraguay
Cuba	Peru
Chile	St. Kitts and Nevis
Colombia	St. Lucia
Costa Rica	St. Vincent and the Grenadines
Dominica	Suriname
Dominican Republic	Trinidad and Tobago
Ecuador	Uruguay
El Salvador	Venezuela
Grenada	
Guatemala	
Guyana	

Middle East/North Africa

Algeria Bahrain Djibouti Egypt Iran Iraq Israel Jordan Kuwait	Lebanon Libya Morocco Oman Qatar Saudi Arabia Syria Tunisia United Arab Emirates Yemen
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South Asia

Afghanistan Bangladesh Bhutan India Maldives	Nepal Pakistan Sri Lanka
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The West

Andorra Australia Austria Belgium Canada Denmark Finland Germany Greece Iceland Ireland Italy Liechtenstein Luxembourg	Malta Monaco Netherlands New Zealand Norway Portugal San Marino Spain Sweden Switzerland United Kingdom United States
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